Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JORGE J. MAYMÓ-MELÉNDEZ,
Petitioner,
v.

JULIO ÁLVAREZ-RAMÍREZ, RICARDO PACHECO-PACHECO, IRBA CRUZ DE BATISTA, AND JUAN ALVES-RUEDA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals decision conflicts with this Court's decision in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), finding a bias exception to the *Younger* abstention doctrine.

Whether the *Younger* abstention doctrine bars injunctive relief from unconstitutional decisions of state administrative agencies as to which a voluntary appeal has not been taken and that have not been reviewed by any state court, as decided by other circuits.

Whether the Court of Appeals erred in finding that the *Rooker-Feldman* doctrine bars federal jurisdiction over a facial challenge to state regulations, notwithstanding the clear holding of past cases, including *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), that a general attack on state law is not precluded by a state court decision applying the challenged law to a particular case.

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Jorge J. Maymó-Meléndez respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the First Circuit ("Court of Appeals") in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, A-1) is reported at 364 F.3d 27 (1st Cir. 2004). The order of the Court of Appeals denying Petitioner's petition for rehearing (App., *infra*, A-22) is unreported. The Opinion and Order of the United States District Court for the District of Puerto Rico ("District Court") (App., *infra*, A-26), as amended (App., *infra*, A-72), is unreported.

JURISDICTION

The Court of Appeals entered its judgment on April 12, 2004. Petitioner's petition for rehearing *en banc* was denied by the Court of Appeals on May 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty, or property, without due process of law".

28 U.S.C. § 1257 provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari...." 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...." The full text of 28 U.S.C. § 1257 and 42 U.S.C. § 1983 is reproduced in the Appendix (App., *infra*, A-76, A-77).

STATEMENT OF THE CASE

This case involves the power of the federal courts to protect Petitioner, a licensed trainer of thoroughbred horses, from being deprived of his livelihood by the unconstitutional application and enforcement of certain medication regulations of the Controlled Medication Program ("CMP") promulgated by the Horse Racing and Sport Administration of Puerto Rico ("Administration") by two Racing Administrators and their subordinates, and the utilization of the *Younger* abstention and *Rooker-Feldman* doctrines by the Court of Appeals to reverse the decision of the District Court granting Petitioner injunctive relief as to the actions of such officials. The Court of Appeals' decision, if allowed to stand, will result in the cruel and unusual imposition of a ten year suspension of Petitioner's license as a horse trainer, tantamount to his permanent exclusion from horse racing, plus fines, and a referral to the Puerto Rico Racing Board ("Racing Board") for Petitioner's license to be suspended for life and for him to be excluded from racetracks in Puerto Rico and the United States.

The Administration is an administrative agency of the Commonwealth of Puerto Rico created to regulate all aspects of the horse racing sport in Puerto Rico through

the Racing Board.[1] In turn, the Racing Administrator is the executive official and administrative director of the Administration for all horse racing activities in Puerto Rico.[2] The decisions of the Racing Administrator are appealed to the Racing Board constituted, at the time of the facts of this case, by three members.[3]

The Administration promulgated the CMP, which is included as part XX of Puerto Rico's Racing Regulations and consists of a series of regulatory provisions as to the administration of drugs to race horses. "Two of the drugs regulated (but not prohibited) by the medication program are Clenbuterol, given to horses with respiratory problems, and Tramadol, which is an analgesic." (App., *infra*, A-3) . At the time relevant to the facts of this

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[1] *See* 15 L.P.R.A. § 198e(a)(1999) (App., *infra*, A-78).

[2] 15 L.P.R.A. § 198k(a)(1999) provides:

> The Administrator shall be the executive official and administrative director of all horse racing activities in Puerto Rico, and he shall have the power, without being limited thereto, to:
>
> (1) Enforce compliance of the racing laws and regulations and the orders and resolutions of the Horse Racing Board.
>
> (2) Grant, suspend temporarily, or permanently cancel the licenses of horse owners, jockeys, trainers, grooms, or any other type of license or permit connected with horse racing activities, except the racetrack licenses.
>
> Provided, That to cancel any of said licenses temporarily or permanently, the Administrator shall notify the person of the charges, and give the injured person the opportunity to be heard in his defense, motu proprio or through counsel.

[3] *See* 15 L.P.R.A. § 198e(b)(10)(1999) (App., *infra*, A-78).

case, the CMP compelled trainers to ensure that the physical condition of their horses was satisfactory, but did not establish withdrawal times and dosage thresholds for the administration of therapeutic drugs, other than Salix, a diuretic. By contrast, all other known racing jurisdictions in the United States had regulations in effect with withdrawal times and dosage levels for therapeutic drugs, such as bronchodilators, diuretics, muscular relaxants, anti-inflammatory medications, expectorants, and vitamins.

After Petitioner's prosecution, at the request of the present Racing Administrator, Julio Álvarez Ramirez ("Álvarez"), and with the approval of the Racing Board, effective August 1, 2002, the Administration joined those other state racing jurisdictions by establishing levels and withdrawal times for the use of Clenbuterol and sixteen other drugs prior to racing.

1. *Clenbuterol Case*

Charges were filed against Petitioner because the urine collected from nine horses[4] trained by him tested positive for Clenbuterol. The charges were filed in August 1999, on behalf of Juan Alves Rueda ("Alves"), the Racing Administrator at the time. Ricardo Pacheco Pacheco ("Pacheco") was the prosecutor, Irba Cruz de Batista ("Cruz"), the hearing examiner, and Alves, the decision-maker.

On November 3, 2000, after adopting Cruz' recommendation, Alves imposed upon Petitioner a five year suspension of his trainer's license, plus a $2,750 fine for the ten alleged violations.

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[4] One horse tested positive twice.

Petitioner petitioned the Racing Board for review of Alves' decision. The Racing Board, after granting a stay of the decision, confirmed the same as a result of the divided vote of its then two members.

Petitioner filed a petition for review of the decision of the Racing Board to the Puerto Rico Circuit Court of Appeals, which granted a stay of Alves' decision pending the resolution of the petition before its consideration. On June 21, 2002, the Puerto Rico Circuit Court of Appeals affirmed Alves' decision and thereafter denied Petitioner's motion to reconsider. On September 12, 2003, Petitioner filed a petition for certiorari with the Supreme Court of Puerto Rico, which was denied without an opinion by the Supreme Court of Puerto Rico on October 25, 2002 (App., *infra*, A-74). Petitioner's motion to reconsider was also denied on December 6, 2002. (App., *infra*, A-75).

2. *Tramadol Case*

Charges were filed against Petitioner because allegedly the urine collected from a horse trained by him tested positive for Tramadol. The charges were filed in November 2000 on behalf of Alves. Pacheco was the prosecutor, Cruz, the hearing examiner, and, upon his appointment as Alves' successor, Álvarez became the decisionmaker and enforcer.

On June 26, 2002, after adopting Cruz' recommendations, Álvarez suspended Petitioner's license for another consecutive five years, imposed a $1,000 fine, and recommended that the Racing Board declare Petitioner a

racing obstruction or nuisance, and, as a result be banned for life from thoroughbred racing.[5]

On July 3, 2002, Petitioner requested that Álvarez reconsider his decision and eight days later Álvarez returned Petitioner's motion giving as a reason the pendency of the proceedings before the District Court.

3. *District Court and Court of Appeals Proceedings*

On June 27, 2002 and July 14, 2002, respectively, Petitioner filed complaints with the District Court under 42 U.S.C. § 1983, as to the Tramadol and Clenbuterol cases, alleging due process violations from the two decisions of the Racing Administrators.

After granting temporary restraining orders in both cases and a five-day consolidated evidentiary hearing, on November 26, 2002, the District Court issued an Opinion and Order[6] granting preliminary injunctive relief enjoining the Respondents from enforcing the two decisions suspending Petitioner's license and imposing fines. The District Court concluded that it had jurisdiction to entertain both cases and that Petitioner had satisfied all four prongs of the preliminary injunction test. The District Court made exhaustive findings of fact that Petitioner satisfied the "likelihood of success on the merits" prong. The facts, as found by the District Court, show flaws in the CMP under which Petitioner was prosecuted, in the manner in which Petitioner was unfairly singled out, denied a meaningful opportunity to defend himself,

[5] *See* 15 L.P.R.A. § 198e(b)(7)(1999) (App., *infra*, A-78).

[6] The Opinion and Order was amended on December 6, 2002 to make certain technical and clerical corrections.

and penalized, as well as to the bias against Petitioner by both Racing Administrators and the other Respondents.

Respondents appealed from the District Court decision and on April 12, 2004, the Court of Appeals issued an Opinion vacating the preliminary injunction on the grounds of the *Younger* abstention doctrine as to the Tramadol case and the *Rooker-Feldman* doctrine as to the Clenbuterol case, holding that they deprive the District Court of jurisdiction and remanded the matter to the District Court for proceedings not inconsistent with its Opinion.

On May 4, 2004, the Court of Appeals denied Petitioner's petition for rehearing *en banc* (App., *infra*, A-22), but on May 26, 2004 granted Petitioner's motion for a stay of the mandate pending review by this Court of the instant petition (App., *infra*, A-24).

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously decided questions of federal law of exceptional importance involving the application of the abstention doctrine enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971) and the *Rooker-Feldman* doctrine as developed in *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). The Court of Appeals' Opinion effectively undermines this Court's decisions and conflicts with other circuit court decisions, as well as with prior decisions of the Court of Appeals itself. Thus, a writ of certiorari should be granted to secure uniformity in the Court's application of these two doctrines.

I. This Court Should Grant Certiorari To Resolve A Conflict in the Circuits As To The Extent and Exceptions To The Younger Abstention Doctrine

A. The Decision of the Court of Appeals Conflicts with this Court's Holding in *Gibson* v. *Berryhill*

As discussed by Petitioner at the Court of Appeals, this Court expressly held in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) that there is a bias exception to the *Younger* abstention doctrine, a court-made rule providing that, with limited exceptions, federal courts should refrain from enjoining ongoing state proceedings.

Nonetheless, the Court of Appeals rejected Petitioner's reliance on the *Gibson*-created exception to the *Younger* doctrine on the basis of bias, by indicating that *Gibson* "was decided only two years after *Younger* began the process of contracting federal-court remedies," while recognizing that "it has never been formally overruled." (App., *infra*, A-19). The Court of Appeals also referred to *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611-12 (1975), decided five years after *Younger*, "where the Supreme Court said that 'of course' exceptions to *Younger*'s bar remain, mentioning not bias but state proceedings brought 'to harass,' or 'in bad faith', or to enforce a flagrantly unconstitutional statute." (App., *infra*, A-19). Any distinction between "bias" and "to harass" or "in bad faith" seems rather subtle[7] and the fact remains that *Gibson* has not and should not be overruled.

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[7] This is recognized by the Court of Appeals when stating that "[t]he scope and conditions of the various *Younger* exceptions remain uncertain." (App., *infra*, A-20).

In referring to *Younger,* the Court of Appeals even recognizes the certainty "that there is some reason for interim federal court intervention where core constitutional values are threatened during an ongoing state proceeding and there is a showing of irreparable harm that is both 'great and immediate'." (App., *infra*, A-20). Petitioner showed, to the satisfaction of the District Court, that both factors are present in this case.

The bias of the administrative decisionmakers in this case is so exceptional that it certainly threatens Petitioner's constitutional rights to due process of law under the Fifth and Fourteenth Amendments. The administrative decisionmakers' unrestrained actions to deprive Petitioner of his livelihood, actions firmly established as biased on the record, threaten Petitioner with both great and immediate harm.

This is precisely what the District Court (the only court to hear Petitioner's case) held after a five day trial in which Petitioner established that all Respondents were biased, and that Álvarez, in particular, was deeply biased by prejudgment and personal animosity towards him. The District Court was persuaded. In its Opinion and Order, the District Court cataloged over six full pages of evidence of bias in its factual findings. (App., *infra*, A-62). This evidence included (1) public statements about Petitioner made by Álvarez while Petitioner's Tramadol case was pending before him, (2) Álvarez' unexplained disparate treatment of Petitioner during public trophy ceremonies, (3) Álvarez' refusal to prosecute another trainer with a positive drug test who happened to train horses owned by Álvarez' brother-in-law, (4) the hearing examiner in both the Clenbuterol and Tramadol cases misquoting the CMP in a self-serving fashion to support

Álvarez' proclaimed intention of barring Petitioner from horse racing, and (5) the seeking and imposition of penalties on Petitioner that severely exceeded those imposed on other trainers with similar or more serious violations of the CMP.

In addition, the bias of Pacheco, the prosecutor employed by Alves and Álvarez and their attorney, as well as the bias of Alves, was established by the testimony of trainer José D. Cruz, who testified in accordance with his sworn statement that upon meeting with Pacheco on September 14, 1999 in regards to two pending Clenbuterol charges against him, Pacheco told him to accept guilt in exchange for a two month suspension and a fine and not to do as Petitioner, who was fighting the cases and was going to get a five-year suspension. Trainer Cruz felt intimidated and accepted the charges against him. (App., *infra*, A-84) Pacheco's prediction as to Petitioner came true when Alves imposed the five-year suspension.

Accordingly, the District Court found that the administrative decisionmakers engaged in "impermissible conduct that is based on unfettered discretion on the part of the Racing Administration" based on bias and "personal animosity" towards Petitioner. (App., *infra*, A-38). The Court of Appeals did not find the District Court's findings of fact to be clearly erroneous, and in fact stated that it "saw force in Maymó's claims of bias or selective enforcement...". (App., *infra*, A-21). Thus, evidence of bias was firmly established by Petitioner.

Furthermore, the Court of Appeals' rationale in concluding that Petitioner cannot fall within any rational *Younger* exception because there is no immediacy, inas-

much as the first five year suspension as to the Clenbuterol case has been immunized from District Court review on account of *Rooker-Feldman,* and that only the Tramadol suspension remains and will not kick in until five years after the Clenbuterol suspension, disregards that the Tramadol case utilizes the Clenbuterol five year suspension to reach an additional consecutive five year suspension and that the Clenbuterol case is the one which gives life to Álvarez' referral to the Racing Board for Petitioner to be declared a "racing nuisance" (App., *infra*, A-21). Thus, the Court of Appeals' conclusion that Petitioner will suffer no immediate harm in the Tramadol case is in error, ignores the *Younger* exception, and contradicts *Gibson*.

The Court of Appeals' approach in applying *Younger* essentially means that claims of agency bias must always be taken to state court, not federal court, effectively eviscerating the *Younger* exception as established by *Gibson* and its progeny for cases involving bias, harassment, or bad faith.

B. The Court of Appeals Opinion Conflicts with this Court's Authority and with the Decisions of at Least Four Other Circuits

In *Patsy* v. *Board of Regents of Fla.*, 457 U.S. 496 (1982), this Court held that a § 1983 plaintiff need not exhaust administrative remedies due to the unique federal interest in civil rights cases. *Id.* at 516. Relying on *Patsy,* the First Circuit has also previously held that a § 1983 plaintiff need not appeal an administrative decision before bringing a civil rights challenge in federal court, notwithstanding *Younger*. *Kercado-Meléndez* v. *Aponte-Roque*, 829 F.2d 255, 260-61 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988). In *Kercado,* the Court of Appeals

applied the ruling in *Patsy* and held that a plaintiff need not appeal an administrative decision before bringing a civil rights challenge in federal court, notwithstanding the *Younger* abstention doctrine, stating:

> [T]here is a significant difference between a civil rights plaintiff who seeks to use the federal courts to stop or nullify an ongoing state proceeding in which she is a defendant, and a civil rights plaintiff who has an option to initiate a state proceeding to remedy a constitutional wrong perpetrated by a state action. In the former case, abstention is appropriate; in the later the Patsy rule prevails.

829 F.2d at 261.

Similarly, in *Barry v. Barchi*, 433 U.S. 55 (1979), this Court affirmed the district court's decision not to abstain in a situation where a horse trainer brought an action in federal court while his administrative options were not exhausted. In *Barry*, the trainer brought his action in federal court after his license was suspended by a New York State Racing and Wagering steward, but before he had his administrative hearing before the New York State Racing and Wagering Board. 433 U.S. at 60-61. Like Respondents, appellants in *Barry* argued that the trainer should not have brought his federal action until he exhausted his administrative remedies. *Id.* at 63 n.10. However, this Court noted that the steward's decision to suspend the trainer's license was in full force and effect, *id.*, and upheld the district court conclusion that *Younger* abstention was not appropriate.

The Third, Fifth, Seventh, and Ninth Circuits have also held that *Younger* does not bar injunctive relief

from the unconstitutional decisions of state administrative agencies that have not been reviewed by any state court. In *Miofsky* v. *Supreme Court*, 703 F.2d 332, 338 (9th Cir. 1983), the Ninth Circuit held that *Younger* abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it and declined to apply the doctrine to the civil rights action at issue.

These precedents apply to Petitioner's § 1983 claim in the Tramadol case, as to which the Court of Appeals decided that the District Court was deprived of jurisdiction on *Younger* abstention grounds. Petitioner, like the plaintiff in *Kercado*, has a final and binding decision from the Administration if he chooses not to exercise his discretionary right to appeal that decision. Thus, the Tramadol administrative decision was final for the purposes of the *Younger* abstention doctrine. As such, there was and there is no ongoing state proceeding to interrupt and *Younger* does not apply.

On April 29, 2004, the United States District Court for the Western District of Kentucky at Louisville issued a particularly relevant decision in the case of *Albarado* v. *Kentucky Racing Commission*, No. 3:04CV-243-H (W.D. Ky. Apr. 29, 2004), holding that *Younger* does not bar federal jurisdiction to a plaintiff's general, facial attack to the constitutionality of a state administrative regulation. This decision relies on a series of relevant cases from the Third, Fifth, Seventh, and Ninth Circuits that are also in conflict with the Court of Appeals' Opinion.[8]

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[8] *See Marks* v. *Stinson*, 19 F.3d 873, 873, 884 (3d Cir. 1994); *Gwynedd Props., Inc.* v. *Lower Gwynedd Tp.*, 970 F.2d 1195, 1201 (3d Cir. 1992); *Smith* v. *Springer*, 859 F.2d 31, 35 (7th Cir. 1988) ; *Ballard* v. *Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988); *Almodovar* v. *Reiner*, 832 F.2d 1138, 1142 (9th Cir. 1987).

Albarado, which held that the plaintiffs-jockeys could display Jockeys' Guild patches and corporate logos while riding horses during the spring meet season at Churchill Downs, and which analyzed the Commonwealth of Kentucky's interest in regulating its thoroughbred horse racing industry, turned on the *Younger* abstention doctrine. In *Albarado*, the Kentucky Horse Racing Authority, the administrative agency empowered with regulating all aspects of horse racing in Kentucky, promulgated a regulation prohibiting jockeys from displaying advertising or promotional symbols or wording in conflict with the traditions of the turf. Before the 2004 Kentucky Derby, the plaintiffs sought a declaration from the federal district court that the regulation was unconstitutional (under the First Amendment) on its face and as applied to them.

Some of the plaintiffs in the federal lawsuit had been prosecuted under the regulation and were engaged in a *pending* state action involving identical or similar legal issues. The federal district court considered the applicability of *Younger* abstention and concluded that it did not apply for several reasons.

First, the federal district court noted distinctions between the federal and state court actions. In federal court, the plaintiffs sought an injunction against future conduct; in state court, the plaintiffs asked the court to set aside a fine imposed or an injunction against a pending proceeding. *Albarado* v. *Kentucky Racing Commission*, slip op. at 6. The federal district court relied on this important distinction to find that *Younger* does not bar federal jurisdiction, despite the fact that the legal issues involved in the federal and state proceedings "are identical in some instances and similar in others". *Id.* In addi-

tion, the federal district court found that the federal action, which sought a prospective declaration as to one of the issues in the state proceeding, did not directly undermine the pending regulatory proceeding or the validity of the agency's continuing regulation of horse racing.

Second, in federal court, the plaintiffs raised issues concerning their federally protected constitutional rights. The federal district court emphasized its role in deciding federal issues, noted that the "abstention doctrine represents an exception to the general duty of a federal court to adjudicate disputes properly before it", *id.* at 5, and held that all claims do not have to be handled first within the state system despite the fact that the plaintiffs could have raised the constitutional issue in state court. In reaching this conclusion, the federal district court weighed the state's interest in interpreting and adjudicating its own regulations and found that the exercise of federal court jurisdiction would not upset or impinge on the state's regulatory process.

The facts of Petitioner's case are similar. In the administrative forum, Petitioner was subject to two enforcement proceedings, *i.e.*, the Clenbuterol and the Tramadol cases. Petitioner appealed the administrative decision imposing sanctions on him in the Clenbuterol case to the Puerto Rico Circuit Court of Appeals. He sought the setting aside of Alves' administrative decision, confirmed as a result of a split vote by the then three members of the Racing Board. The Puerto Rico Circuit Court of Appeals affirmed Alves' decision and the Puerto Rico Supreme Court, without an opinion, denied certiorari. The administrative decision in the Tramadol case has not yet been appealed and Álvarez has stayed its effects as a result of the litigation before the District Court. In federal court

Petitioner mounted a general, facial attack to the constitutionality of those regulations of the CMP that underlie the enforcement actions against him in both the Clenbuterol and Tramadol cases. Although Petitioner sought the setting aside of the administratively imposed sanction in both cases, there is no question that he also specifically sought prospective relief due to the unconstitutionality of the particular regulations of the CMP under which he was prosecuted. (App., *infra,* A-33). However, despite this important distinction, the Court of Appeals found that the District Court should have abstained from considering Petitioner's claims regarding the Tramadol case under *Younger* abstention principles. This was in error.

The District Court should not be forced to abstain because Petitioner raised important federal issues seeking protection of his constitutional right to due process of law under the Fifth and Fourteenth Amendments. In addition, in keeping with the *Albarado* court's analysis, the Commonwealth of Puerto Rico's interest in regulating horse racing is certainly not greater than that of Kentucky, the host of the Kentucky Derby, the most visible and prominent horse race in America, if not the world. Thus, due to the bias, harassment, and bad faith exceptions to the *Younger* doctrine, which are applicable here, and that the appeal on the Tramadol decision is not mandatory, Petitioner's constitutional claims were properly subject to the District Court's jurisdiction.

II. This Court Should Grant Certiorari To Resolve A Conflict With Authority From This Court And A Conflict In The Circuits As To The Rooker-Feldman Doctrine

The *Rooker-Feldman* doctrine derives its name from the decisions of *Rooker* v. *Fidelity Trust Co.,* 263 U.S.

413 (1923) and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), decided 60 years after *Rooker*. There are no other decisions by this Court on this doctrine.

The basic theory behind *Rooker-Feldman* is that ordinarily only this Court has jurisdiction to review "final judgments... rendered by the highest court of a state in which a decision could be had", as indicated in 28 U.S.C. § 1257. (App., *infra*, A-76). *Rooker* dealt with a bill in equity for relief from a state court judgment alleged to have violated the Contract Clause, the Due Process Clause and other federal statutes. The decision of this Court shows that it could not find any ground for a collateral attack on the judgment and considered the bill to be an attempt to set it aside for alleged errors of law committed in the exercise of the state court's jurisdiction.

Feldman involved an action brought by a law school graduate in a federal district court to challenge, on constitutional grounds, the decision of the District of Columbia Court of Appeals of not making an exception to a local rule that limited admission to the bar. The federal district court dismissed the case for lack of jurisdiction to review an order of the District of Columbia court. The federal court of appeals, while recognizing that only this Court can review the judgment of the *highest* state tribunal, concluded that the District of Columbia court had not acted in a judicial capacity. This Court reversed in turn concluding that the action on the request to waive the bar admission requirements was judicial in nature and established the maxim that federal district courts have subject matter jurisdiction to the extent they are asked "to assess the validity of a rule promulgated in a nonjudicial proceeding" and that the test is whether the allegations are "inextricably intertwined

with" the decisions made in a judicial capacity. *Feldman*, 460 U.S. at 486.

In this case, the Court of Appeals, which raised the *Rooker-Feldman* doctrine *sua sponte*, erroneously applied the same because Petitioner's § 1983 claims are not inextricably intertwined with the denial of certiorari by the Supreme Court of Puerto Rico in the Clenbuterol case inasmuch as (1) Petitioner attacked the CMP on its face, (2) there is no final judgment from Puerto Rico's highest court in which a decision could be had, and (3) Petitioner never had the opportunity to fully and fairly litigate the merits of the § 1983 claims until the proceedings before the District Court.

A. Petitioner Attacked the CMP on its Face

In *Feldman*, this Court held that to the extent the plaintiffs "mounted a general challenge to the constitutionality of the [accreditation requirement]", the federal district court had subject matter jurisdiction over their complaint because a general attack does not require review of a judicial decision in a particular case. *Feldman*, 460 U.S. at 483, 486.

The Court of Appeals itself, in *Wilson* v. *Shumway*, 264 F.3d 120 (1st Cir. 2001), has recognized that a general constitutional challenge renders *Rooker-Feldman* inapplicable in finding that the federal plaintiff did not mount a general attack because "all of the relief sought would only impact [him]." *Id.* at 125. In *Piper* v. *Supreme Court of New Hampshire*, 723 F.2d 98, 100 n.4 (1st Cir.), *aff'd on other grounds*, 723 F.2d 110, 118 n.1 (1st Cir. 1983) (*en banc*), *aff'd*, 470 U.S. 274 (1985), the Court of Appeals allowed jurisdiction over a generalized challenge to a

state bar rule without requiring that the federal court plaintiff take the state court decision through all available state appellate channels.

In *Texaco, Inc.* v. *Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), the Second Circuit found federal jurisdiction through analysis of a litigant's ability to obtain relief under 42 U.S.C. § 1983. It held that interpreting the *Rooker-Feldman* doctrine and 28 U.S.C. § 1257 as barring Texaco's constitutional claim would limit a party's ability to seek relief under § 1983 because most claims under § 1983 can be raised in a related state proceedings. The Second Circuit found this neutralization of the statute's operability to seem contrary to § 1983's purpose of allowing the federal courts to provide protection from unconstitutional actions under color of state law. *Id.* at 1144.

Upon this Court's review, three of the concurring Justices in *Pennzoil Co.* v. *Texaco, Inc,* 481 U.S. 1-(1987), discussed *Rooker-Feldman*. Five justices expressly rejected *Rooker-Feldman* and three others did so by implication. Justice Powell's plurality opinion did not reach the *Rooker-Feldman* issue, holding instead that the lower courts should have abstained under *Younger*. This should be constructed as tacit recognition that the district court had jurisdiction over the § 1983 claim. As indicated by Justice Marshall in his concurring opinion, "[t]here is no occasion to decide if abstention would have been proper unless the District Court had jurisdiction". *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 23. Justice Brennan, who authored the opinion in *Feldman*, concurring in *Pennzoil Co.* v. *Texaco, Inc.*, rejected Pennzoil's argument that *Rooker-Feldman* deprived the district court of jurisdiction, indicating that Texaco, as Petitioner, had filed the § 1983 action to protect

its federal constitutional right to a meaningful opportunity for appellate review, not as a challenge to the merits of the state court suit and thus was an action apart to the merits of the state court judgment.

In *Hefner* v. *Alexander*, 779 F.2d 277, 282 (5th Cir. 1985), the Fifth Circuit held that a general attack on the state's attorney disciplinary scheme was proper under *Feldman*. *See also Dasher* v. *Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981) (where bar exam applicant did not raise constitutional claims in state action and was precluded from seeking certiorari, § 1983 suit did not constitute an impermissible effort to seek review of a state court judgment in a lower federal court).

In *Wood* v. *Orange County*, 715 F.2d 1543, 1546 & n.1 (11th Cir. 1983), *cert denied*, 467 U.S. 1210 (1984), the Eleventh Circuit stated that the district court would have jurisdiction despite *Rooker–Feldman* if the plaintiffs' action was characterized as a general challenge to the constitutionality of the state regulation at issue.

This Court has also interpreted § 1983 as providing "dual or concurrent forums in the state and federal systems, enabling the plaintiff to choose the forum in which to seek relief." *Patsy* v. *Board of Regents of Fla.*, 457 U.S. at 506. In *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972), this Court held that in certain exceptional circumstances, plaintiffs may enjoin state court proceedings in a civil rights action under § 1983. Specifically finding that § 1983 cases are even an exception to the Anti-Injunction Act, the Court stated: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect people from unconstitutional action under color of state law, 'whether

that action be executive, legislative, or judicial.'" *Id.* at 242; *see also Miofsky* v. *Supreme Court*, 703 F.2d at 338. Therefore, this precedent indicates that "inextricably intertwined" should be narrowly construed.

In this case, it is clear that Petitioner mounted a general attack on the CMP by asking the District Court to declare the regulatory provisions of the CMP which were applied to him unconstitutional. (App., *infra*, A-33, A-12). Thus, Petitioner's general federal court challenge to the regulatory provisions of the CMP unconstitutionally applied to him is not "inextricably intertwined" with the action of the Supreme Court of Puerto Rico denying Petitioner's petition for certiorari of the judgment of the Puerto Rico Circuit Court of Appeals or the latter, because it mounts a facial attack on those regulations.

B. There Is No Final Judgment

Petitioner's federal claims of unconstitutionality do not all arise from the application of the particular regulations of the CMP to him in both the Tramadol and Clenbuterol cases. His attack goes to the regulations as promulgated and not as applied by the Racing Administrators and, in the Clenbuterol case, by the Puerto Rico Circuit Court of Appeals. This in itself shields this case from the scope of 28 U.S.C. § 1257, since general attacks do not necessarily require a federal district court to review a final state judgment in a judicial proceeding.

Moreover, Petitioner's federal court action constituted a challenge to the ongoing effects of the regulations to which Petitioner remains subject in the Tramadol case. This is particularly so since the Supreme Court of Puerto

Rico did not express itself as to Petitioner's federal constitutional contentions and therefore, there is not a decision from Puerto Rico's highest court under 28 U.S.C. § 1257.

This Court has recognized instances where *Rooker-Feldman* ought not to be administered in such a mechanical fashion in situations where a departure from the requirement of finality for its jurisdiction to take effect under 28 U.S.C. § 1257 is warranted, because the federal issue for its review has been finally decided by the highest court of the state, although further proceedings as to other issues are pending in lower state courts. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). Under the same rationale, *Rooker-Feldman* ought not to apply when the federal constitutional issues have not been finally decided by the highest court of the state, as in the present case where the Supreme Court of Puerto Rico limited its decision to denying Petitioner's petition for certiorari of the Puerto Rico Circuit Court of Appeals judgment. The denial by the Supreme Court of Puerto Rico of Petitioner's petition for certiorari doesn't constitute an affirmance of the same. *El Pueblo de Puerto Rico* v. *Ángel Luis Carrión Rivera*, 111 D.P.R. 825 (1981); *Minerva Ayala Hernández* v. *Pedro A. San Miguel Negrón*, 2002 WL 544569 (Circuit Court of Appeals of Puerto Rico, Mar. 27, 2002).[9] *See also Biddulph* v. *Mortham*, 89 F.3d 1491, 1495 (11th Cir. 1996) (denial of petition for mandamus cannot be treated as an adjudication on the merits).

C. Petitioner Did Not Have Opportunity to Fully and Fairly Litigate the Merits of His §1983 Claim

Rooker-Feldman is also inapplicable because Petitioner never had the opportunity to fully and fairly litigate the merits of his claims before a judicial forum or any-

[9] Official translations requested.

where else until the litigation before the District Court. After *Allen* v. *McCurry*, 449 U.S. 90, 97-98 (1980), civil rights plaintiffs are prohibited from relitigating any matters that a state court decided as long as there was an opportunity for full and fair litigation. In *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 462 (1982), in applying the principle of *res judicata*, this Court decided that the state procedures must offer a full and fair opportunity to litigate the merits in order to qualify for the full faith and credit guaranteed by federal law. *See also In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003).

Within this context, the Court of Appeals held that "[i]f [Petitioner] had been summarily suspended by the Racing Administrator and no administrative proceeding had been begun, he could have gone directly to federal court to challenge his dismissal." (App., *infra*, A-16). The Court of Appeals immediately recognizes that "a line between summary action and full-fledged administrative proceedings that are judicial in nature is bound to be fuzzy." (*Id.* at 17). This is particularly so in this case where the Court of Appeals also recognizes that the medication regulation "was unfairly implemented" by none other than those entrusted with the responsibility of guaranteeing a full-fledged fair quasi-judicial administrative proceeding to Petitioner. (*Id.* at A-21).

There are indications that federal jurisdiction may not be ousted by a state judgment in proceedings that violate due process rights. In *Rhoades* v. *Penfold*, 694 F.2d 1043 (5th Cir. 1983), the Fifth Circuit held that the federal district court had jurisdiction over a parent's § 1983 complaint seeking relief from state court judgment terminating parental rights by alleging that the state court proceeding (in which she was not afforded counsel) was a

deprivation of her constitutional rights. The Fifth Circuit stated that it would be manifestly unjust to refuse to hear her claim on the basis that she should have raised it before the state court. *See also Matter of Caranchini*, 160 F.3d 420 (8th Cir. 1998), in which the Eighth Circuit indicated that federal courts should not defer to state court attorney disciplinary decision when state procedure lacks due process. In *Caranchini*, the Eighth Circuit found that there was not a due process violation because plaintiff, unlike Petitioner, had a hearing and full opportunity to litigate in state court, including the opportunity to present evidence in the state supreme court. *Id.* at 423-24.

In this regard, Wright, Miller & Cooper, § 4469.1 states:

> State court disregard of due process rights creates genuine trouble for the *Rooker-Feldman* jurisdiction theory. The Supreme Court has been careful to ensure that a judgment entered without due process is not entitled to full faith and credit in any court, state or federal. This doctrine would be meaningless as to federal courts if the state judgment always defeated federal jurisdiction. The only line possible is that some forms of federal proceeding, although not formally framed as an appeal from the state judgment, come too close to appellate review to be tolerated. Other forms escape this peril, support federal jurisdiction, and may lead to an independent federal judgment. The approximate location of the line may be guessed from [. . . cases . . .] dealing with more-or-less direct attacks on, and collateral respect due to state judgments. But fixing the line remains an uncertain chore, and justifying the line a thankless task. So long as there is to be a separate jurisdiction doctrine, it should coincide with the due pro-

cess limit on preclusion.

> These doubts renew the question whether much should be made of the apparently entrenched *Rooker-Feldman* jurisdiction doctrine. There is much to be said for limiting as narrowly as possible this transmutation of the res judicata doctrine into jurisdictional dogma. Narrow application will reduce the occasions that require a federal court to give greater effect to a state judgment than would be recognized in state courts... One court has taken the attractive position that jurisdiction should be denied only as to claims that seek to "undo a remedial order of some sort." (footnotes omitted).

Finally, the harm which can result from a mechanical *Rooker-Feldman* jurisdictional approach to preclusion between state and federal courts is illustrated by *Kamilewicz* v. *Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *rehearing en banc denied*, 110 F.3d 1348 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997), and the case at bar. In *Kamilewicz*, the *Rooker-Feldman* doctrine was applied despite the fact that the state court judgment (in which a class action plaintiff recovered less than $10 and had to pay nearly $100 in attorneys' fees) seemed obviously questionable. As to Petitioner's case, even the expressed distasteful position of the Court of Appeals in vacating the decision of the District Court and not being able to grant Petitioner remedial action has yielded to the often-criticized *Rooker-Feldman* doctrine, as applied here.[10] This mechanical application has eviscerated the fundamental principles of justice that are the pillars of

[10] In its Opinion, the Court of Appeals stated, "This case is not one in which a denial of relief is a comfortable outcome. [...] [Petitioner's] suit is by no means totally unfounded, frivolous, or otherwise unreasonable" (App., *infra*,A-21 (citations omitted)).

our american system of law.[11]

Different from the *Kamilewicz* court and the Court of Appeals, other courts have found jurisdiction in comparable circumstances by addressing the wrongful acts of the state court actors as the underlying cause of the injury that was more immediately caused by the judgment. "At least two circuit courts have suggested that the *Rooker-Feldman* doctrine does not bar a federal court from considering a challenge to the constitutionality of the process by which a state court judgment was reached." *Lefebve* v. *Barnsley*, 1999 WL 813923 (D.N.H. Sept. 22, 1999) (citing *Catz* v. *Chalker*, 142 F.3d 279, 294 (6th Cir. 1998); *Nesses* v. *Shepard*, 68 F.3d 1003, 1005 (7th Cir. 1995)). *See also Ernst* v. *Child & Youth Servs.*, 108 F.3d 486, 491-92 (3d Cir. 1997), *cert. denied,* 522 U.S. 850 (1997)(civil rights action not precluded by *Rooker-Feldman* because federal court was not required to rule on whether state court judgment was erroneous and state never ruled on due process claims). The *Rooker-Feldman* doctrine should be limited to actions seeking an order directed to a state court. *See* Wright, Miller & Cooper, § 4469.1:

> An action framed formally as an appeal, an extraordinary writ, an injunction directed to a court, or in any other form that would direct action by the state court is outside federal subject-matter jurisdic-

[11] It must be pointed out that contrary to the District Court and the Court of Appeals, the Puerto Rico Circuit Court of Appeals decided that Clenbuterol is a prohibited drug, this being the principal basis of its ruling and intertwined with its conclusions, particularly the erroneous determination as to the existence of a zero tolerance policy for drugs except Salix.

> tion... Beyond that modest limit, however, it is dangerous to attempt to draw lines between impermissible 'direct' attacks on state judgments and permissible collateral disrespect. The well-developed doctrines of *res judicata* and full faith and credit, supplemented by abstention and comity, protect state interests as well as should be.

To sustain that Petitioner's federal constitutional rights could only be vindicated by certiorari to this Court is tantamount to deciding that the doors of the federal judiciary system were financially closed to him due to the great cost involved in such an endeavor.[12] To illustrate, Petitioner's petition to the Supreme Court of Puerto Rico and the appendix consisted of 1822 pages in Spanish. Adding Petitioner's motion to reconsider (12 pages) and the resolutions of the Puerto Rico Supreme Court (4 pages), there is a total of 1838 pages in Spanish which could have had to be translated to English in the review process of this Court, at an approximate cost of $33,084.00 (App., *infra*, A-90).[13]

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[12] Petitioner's case has been handled *pro bono* at all levels by the undersigned.

[13] Calculated at $18.00 per page. *See* Rule 14(1)(i) of the Rules of this Court.

United States Court of Appeals
For the First Circuit

No. 03-1141

JORGE J. MAYMÓ-MELÉNDEZ,
Plaintiff, Appellee,

v.

JULIO ÁLVAREZ-RAMÍREZ, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, *U.S. District Judge*]

Before Boudin, *Chief Judge*, Torruella and Lynch, *Circuit Judges.*

Ivette M. Berríos-Hernández with whom *Eduardo A. Vera-Ramírez* and *Landrón & Vera L.L.P.* were on brief for appellants.

Charles A. Cuprill-Hernández with whom *Charles A. Cuprill, P.S.C. Law Offices* was on brief for appellee.

April 12, 2004

BOUDIN, *Chief Judge*. This appeal concerns efforts by the Puerto Rico Horse Racing Industry and Sport Administration (the "Administration") to suspend the horse training license of Jorge Maymó-Mel´Endéz ("Maymó") for improperly administering drugs to certain race horses under his care. The district court granted a preliminary injunction preventing Maymó's suspension and the appellants now seek reversal of that order.

Pursuant to the Puerto Rico Horse Racing Industry and Sport Act, 15 L.P.R.A. §§ 198-198s (2000), the Administration was "created as a public instrumentality to regulate everything connected with the horse racing sport in the Commonwealth of Puerto Rico." *Id.* § 198a. The Administration is comprised of a Racing Board, which is made up of three members, and a Racing Administrator; the members of the Racing Board and the Racing Administrator are appointed by the Governor of Puerto Rico. *Id.* §§ 198c(a), 198 (a).

The Racing Board is "empowered to regulate everything connected with the Horse Racing Sport," 15 L.P.R.A. § 198e(a), including "[t]o prescribe, by regulations, the fines, administrative penalties and suspensions that can be imposed by the [Racing] Board, the Horse Racing Administrator, . . . or other authorized officials." *Id.* § 198e(b)(8). The Racing Administrator is the Administration's principal executive officer, *id* § 198k(a), and has the power to "[e]nforce compliance [with] the racing laws and regulations and the orders and resolutions of the Horse Racing Board," *id* § 198k(a)(1), and to "[g]rant, suspend temporarily, or permanently cancel the licenses of horse . . . trainers" after notice and hearing. *Id.* § 198k(a)(2).

In 1996, the Racing Board promulgated the "controlled medication program," a set of regulations that governs the administration of drugs to race horses. The controlled medication program prohibits some drugs outright; others are allowed, but only if administered in accordance with established procedures by authorized personnel. Two of the drugs regulated (but not prohibited) by the medication program are Clenbuterol, given to horses with respiratory problems, and Tramadol, which is an analgesic.

Between June 10, 1999, and June 21, 1999, nine horses that had been trained by Maymó underwent post-race urine tests that came back positive for Clenbuterol—one horse tested positive twice, thus making a total of ten positive tests. By August 17, 1999, then Racing Administrator Juan Alves Rueda ("Alves") had filed ten corresponding charges against Maymó, alleging that Clenbuterol had been administered in violation of the controlled medication program. Alves consolidated the charges (the "Clenbuterol case"), assigned Irba Cruz de Batista ("Cruz"), an independent contractor for the Administration, to act as hearing examiner, and ordered Ricardo Pacheco Pacheco ("Pacheco"), an attorney employed by the Administration, to act as prosecutor. 15 L.P.R.A. § 198k(a)(9).

Hearings in the Clenbuterol case were held before Cruz from August to October 2000. In the midst of these proceedings, on September 29, 2000, a horse trained by Maymó underwent a post-race urine test that came back positive for Tramadol. On October 16, 2000, Cruz submitted a report to Alves, concluding that, in all ten instances, Maymó had administered the Clenbuterol in violation of the controlled medication program. Maymó filed objec-

tions to Cruz's report, but on November 3, 2000, Alves adopted the report, accepting its findings of fact and conclusions of law. Alves suspended Maymó's license to train horses for five years and imposed a $2,750 fine.

Maymó filed a petition for review of Alves's decision with the Racing Board, 15 L.P.R.A. § 198m, and moved for a stay of the license suspension and fine pending review. While Maymó's petition and motion were pending before the Racing Board, Alves filed a new charge against Maymó based on the positive Tramadol test (the "Tramadol case"); Alves again assigned Cruz as hearing examiner and Pacheco as prosecutor. The Racing Board ultimately granted Maymó's requested stay in the Clenbuterol case, and later Maymó's license was renewed for the following year. *Id.* § 198o(b).

On April 9, 2001, the Racing Board, by divided vote, sustained Alves's decision in the Clenbuterol case, affirming the five-year suspension of Maymó's license and the $2,750 fine. Pursuant to 15 L.P.R.A. § 198n(a), Maymó sought review of the Racing Board's decision in Puerto Rico's Circuit Court of Appeals. That court granted Maymó a stay of the penalties that had been imposed upon him pending resolution of his appeal.

In June 2001, Julio Álvarez Ramírez ("Álvarez") succeeded Alves as Racing Administrator. Hearings in the Tramadol case were held before Cruz from January to May 2002. On June 10, 2002, Cruz sent a report to Álvarez, concluding that Maymó had violated the controlled medication program by improperly administering Tramadol to the horse in question.

On June 21, 2002, the Puerto Rico Circuit Court of Appeals affirmed the Racing Board's decision in the Clenbuterol case. However, Álvarez took no immediate action to impose the license suspension and the fine, there being some uncertainty as to whether the court's stay continued in effect until its mandate issued. On June 26, 2002, Álvarez adopted Cruz's findings of fact and conclusions of law in the Tramadol case. Álvarez directed that Maymó's license be suspended for five years to run consecutively to the pending suspension in the Clenbuterol case and imposed a $1,000 fine.[1]

On June 27, 2002, with the suspension of his license from the Tramadol case set to begin on July 1, 2002, Maymó filed suit under 42 U.S.C. § 1983 (2000) in federal district court in Puerto Rico against Álvarez, Pacheco, and Cruz. The suit, directed solely to the suspension in the Tramadol case because the Clenbuterol case remained in limbo in the state court, alleged due process violations: that the controlled medication program was unconstitutionally vague and arbitrary and that the named defendants were unfairly biased against Maymó. The suit sought damages and to enjoin the Racing Administrator from suspending Maymó's license.

On July 3, 2002, notwithstanding the federal lawsuit, Maymó petitioned the Racing Board for review of Álvarez's June 26, 2002, decision, adopting Cruz's findings

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[1] Álvarez also referred Maymó to the Racing Board, asking that it declare Maymó a "racing nuisance," a statutory brand that, if imposed, would have subjected Maymó to criminal penalties (including up to ten years in prison) for even attempting to enter a "racetrack or dependency thereof." 15 L.P.R.A. § 198e(b)(7).

of fact and conclusions of law in the Tramadol case. 15 L.P.R.A. § 198m. On the same day, the federal district court held a hearing on Maymós request for interim relief relating to the Tramadol suspension. At the hearing, Álvarez made clear that he intended to suspend Maymó's license based on the Clenbuterol case when the state-court stay expired. With respect to the Tramadol case, the district court ultimately entered a temporary restraining order pending resolution of the request for a preliminary injunction.

On July 11, 2002, Maymó having failed to obtain an extension of the state-court stay, Álvarez suspended Maymó's license based on the Clenbuterol decision.[2] That same day, Álvarez returned to Maymó his petition for the Racing Board to review the Tramadol decision, saying that review was pointless in light of the ongoing litigation in federal court. On July 14, 2002, Maymó filed a second federal action, similar to the first (except for the addition of Alves as a defendant), to enjoin suspension based on either the Clenbuterol or the Tramadol case; the district court consolidated the two federal cases and issued a second temporary restraining order.

From September 30, 2002, to October 4, 2002, the district court conducted a hearing on whether to issue a preliminary injunction barring the Racing Administrator from suspending Maymó's license. On the first day of this

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[2] On August 7, 2002, the Puerto Rico Circuit Court of Appeals denied Maymó's motion for reconsideration of its decision affirming the Racing Board in the Clenbuterol case. Maymó sought review in the Supreme Court of Puerto Rico. On October 25, 2002, the Supreme Court of Puerto Rico denied Maymó's petition for further review.

hearing, the defendants filed a motion to dismiss, arguing *inter alia* that the district court should refrain from deciding the consolidated cases based on the principles of abstention outlined in *Younger* v. *Harris*, 401 U.S. 37 (1971), and that the defendants were covered by quasi-judicial or qualified immunity.

On November 26, 2002, the district court issued an opinion and order holding the following: that the individual defendants were entitled to qualified immunity and immune from money damages; that abstention under *Younger* was not appropriate; and that Maymó was entitled to a preliminary injunction preventing the defendants from suspending his license and collecting the fines that had been levied against him. The defendants now appeal, arguing that *Younger* abstention was required and, alternatively, that Maymó failed to establish the prerequisites for a preliminary injunction.

Younger is a court-made rule of abstention built around the principle that, with limited exceptions, federal courts should refrain from issuing injunctions that interfere with ongoing state-court litigation, or, in some cases, with state administrative proceedings. *See generally Younger*, 401 U.S. at 43-45, 53-54. This core principle leaves open a host of peripheral questions to which the precedents provide only half answers or decisions in tension with one another. *See* Chemerinsky, *Federal Jurisdiction* § 13.3 (3d ed. 1999); 17A Wright, Miller & Cooper, *Federal Practice and Procedure* § 4251, at 180-81, 191-93 (2d ed. 1988). This case poses several of those problems.

Although initially applied to protect state criminal prosecution against interference, the *Younger* doctrine has been extended to "coercive" civil cases involving the

state and to comparable state administrative proceedings that are quasi-judicial in character and implicate important state interests.[3] In regulating thoroughbred racing, the Commonwealth aims to ensure the integrity of the sport and to protect legitimate state interests. The proceedings within the Racing Board to cancel licenses after notice and hearing fit within the category of matters potentially subject to *Younger*. *See Baffert* v. *Cal. Horse Racing Bd.*, 332 F.3d 613, 616-21 (9th Cir. 2003) (applying *Younger*).

The district court said that *Younger* abstention did not apply because neither the Clenbuterol nor the Tramadol matters were "ongoing" at the time the principal injunction was granted on November 26, 2002. By that time the state-court proceedings affirming the sanction in the Clenbuterol case were effectively completed with the affirmance of the Racing Board's action; and in the Tramadol case, the Racing Administrator had imposed penalties and had returned Maymó's review petition so no proceedings were pending before the Racing Board.

Although the Clenbuterol case had been decided by the state appeals court when Maymó filed his second federal complaint–the time at which the *Younger* test is

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[3] *See Huffman* v. *Pursue Ltd.*, 420 U.S. 592, 603-05 (1975) (applying *Younger* to a civil proceeding initiated by the state to enforce a nuisance statute); *Ohio Civil Rights Comm'n* v. *Dayton Christian Schs. Inc.*, 477 U.S. 619, 623-27 (1986) (applying *Younger* to state administrative proceedings based on alleged sex discrimination); *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432, 435 (1982) (applying *Younger* to administrative proceedings brought by state ethics committee to discipline an attorney).

applied, *Bettencourt* v. *Bd. of Registration in Med.*, 904 F.2d 772, 777 (lst Cir. 1990)—the state case was still technically ongoing because Maymó had filed a petition for reconsideration. Yet it would be a waste of time to reverse based on this technicality,[4] and, as it turns out, the injunction against the Clenbuterol order is barred on other grounds to which we will shortly turn.

Although *Younger* is ordinarily described as applying where the state case or proceeding is "ongoing," a moment's reflection suggests that this cannot be the whole story. There is some sense to a mechanical rule that *Younger* does not apply where the state litigation has not yet begun; after all, the underlying concern is that state proceedings, once begun, should be respected by federal courts so long as the federal claims or defenses can be litigated in the course of the proceedings. *See Younger*, 401 U.S. at 44-45, 53-54; *cf. Brooks* v. *N.H. Supreme Court*, 80 F.3d 633, 638 (1st Cir. 1996).

However, it makes little sense to ignore *Younger's* policy simply because the state process has come to an end. After all, how does it "respect" state proceedings to wait until they are concluded and then ignore or overturn them? And yet the case law is something of a vacuum on this question, partly because of the variousness of the situations but mostly because other rubrics usually foreclose the collateral attack after the state proceedings have ended, making unnecessary any discussion of *Younger*.

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[4] Because a dismissal on *Younger* grounds is without prejudice, *see Caldwell* v. *Camp*, 594 F.2d 705, 708 (8th Cir. 1979), Maymó would presumably be free in this case to re-file the complaint immediately (state court review having now undoubtedly concluded).

Three such rubrics have special force where, as with the Clenbuterol proceedings, state-court judicial review of an administrative ruling has been undertaken and completed: res judicata, the federal full faith and credit statute, and the *Rooker-Feldman* doctrine.[5] Although nominally independent doctrines, they are variations on the same theme: the first embodies a bedrock respect for prior judgments, subject to exceptions; the second, a statutory compulsion for the first where federal courts confront state judgments; and the third, a broader and blunter version of the other two.

Often the first resort of federal judges is to the *Rooker-Feldman* doctrine—and peculiarly so in case of disbarment, revocations of licenses, and the like. *See* 18B Wright, Miller & Cooper, *supra*, § 4469.1, at 120. Merger and bar doctrine is often hard to adapt to claims not cast in the traditional common law mode; and collateral estoppel requires the precise identification of issues actually litigated and decided in the first case and sought to be relitigated in the second. *Restatement (Second) of Judgments* § 27 & cmt. c-o (1982). So, despite the disapproval of scholars, federal courts regularly use *Rooker-Feldman* to rebuff collateral attacks on prior state court

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[5] Res judicata is familiar common law doctrine, *see Restatement (Second) of Judgments* §§ 17-20, 24, 27 (1982); the federal statute is 28 U.S.C. § 1738 (2000); and *Rooker-Feldman* refers to *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). It is no accident that the doctrines are discussed together in 18B Wright, Miller & Cooper, *supra*, §§ 4469-4469.1.

judgments without purporting to apply the technical preclusion rules of res judicata. [6]

One obvious reason is that when a state judicial proceeding does occur, federal judges usually say that the parties ought to raise all of their claims, defenses and objections. If the parties do, and are permitted to litigate the issues, the judges think that should ordinarily settle the matter, subject to *certiorari* review in the Supreme Court; and if they don't, they should not later come and complain to the federal courts. There are pluses and minuses to this approach but, with some exceptions, it has carried the day so far, and it does so here as to the Clenbuterol case.

In that case, the Racing Administrator and the Racing Board may have been biased, unfair, or flat out wrong; but the state provided a judicial remedy, Maymó invoked it, and he lost. Maymó conceded at oral argument that he had argued to the state court in the Clenbuterol case both that the medication program was constitutionally flawed and that bias infected the administrative proceeding. Although he disputes that he had a full and fair opportunity to litigate these issues, we address this claim below and find that it is unpersuasive.

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[6] The catalogue of federal cases doing so, and the scholarly disapproval, are both reflected in 18B Wright, Miller & Cooper, *supra*, § 4469.1. For a thick law review volume devoted to (thus far ineffectual) scholarly criticism of *Rooker-Feldman, see* Symposium: The Rooker-Feldman Doctrine, 74 Notre Dame L. Rev. 1081, 1081 (1999).

To enjoin enforcement of the Racing Board's sanction, after its affirmance by the state court, amounts to a collateral attack on a state court judgment. *See, e.g., Wang* v. *N.H. Bd. of Registration in Med.*, 55 F.3d 698, 703 (lst Cir. 1995). *Rooker-Feldman* does not depend on what issues were actually litigated in the state court; and it is enough that granting Maymó the injunction he seeks would effectively overturn the state court's decision. The case law to this effect is extensive. E.g., *Mandel* v. *Town of Orleans*, 326 F.3d 267, 271 (lst Cir. 2003); *Hill* v. *Town of Conway*, 193 F.3d 33, 39-40 (lst Cir. 1999).[7]

There are exceptions to *Rooker-Feldman*, see 18B Wright, Miller & Cooper, supra, § 4469.1, at 127-37, and the one that comes closest derives from cases saying that a general attack on a state law or regulation is not precluded by a prior judgment applying such a law or rule to the federal plaintiff. *Id.* at 123; *Wilson* v. *Shumway*, 264 F.3d 120, 124 (lst Cir. 2001). The exception does not apply, however, if the relief sought in federal court is directed towards undoing the prior state judgment. *See Kenmen Eng'g* v. *City of Union*, 314 F.3d 468, 476 (10th Cir. 2002) ("In conducting [*Rooker-Feldman*] analysis, we must pay close attention to the relief sought by the federal-court plaintiff." (emphasis in original)).

Here, one facet of Maymó's due process claim was a general attack on the Racing Board's drug regulations; he argued that they were unconstitutionally vague and

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[7] The *Rooker-Feldman* doctrine was not raised as an objection on this appeal, but it is jurisdictional, *Mandel*, 326 F.3d at 271, and cannot be ignored. *Friedman's Inc.* v. *Dunlap*, 290 F.3d 191, 195-96 (4th Cir. 2002).

contradictory and the district court agreed. But, so far as advanced as a reason to grant an injunction overturning his license suspension, Maymó's challenge is an attack on the Puerto Rico Circuit Court of Appeals's decision affirming the suspension and is therefore barred by *Rooker-Feldman*. *See Wilson*, 264 F.3d at 125; Hill, 193 F.3d at 39-40. Had he been suspended for a week and then sought to enjoin future enforcement of the regulations, that would be a different question. See *Hood* v. *Keller*, 341 F.3d 593, 597-99 (6th Cir. 2003).

Maymó's assault on the Tramadol suspension presents a different problem. As to it, there was no state-court proceeding; indeed, Maymó was only to the stage of appealing the Racing Administrator's decision to the Racing Board when he brought his initial federal action to enjoin the suspension. *Rooker-Feldman* is based on the Supreme Court's reading of a statute governing review of state-*Court* judgments, *Feldman*, 460 U.S. at 476 (relying on 28 U.S.C. § 1257 (2000)); *Rooker-Feldman* does not insulate from federal challenge administrative rulings standing alone. *Van Harken* v. *City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997); 18B Wright, Miller & Cooper, *supra*, § 4469.1, at 143-44.

However, *Younger* (as already noted) does apply to administrative proceedings like this one. Thus, we confront the district court's conclusion that *Younger* did not apply in this case because the administrative proceedings in the Tramadol case were not ongoing when the first federal action to enjoin the Administrator's order was filed. True, thereafter Maymó sought review by the Racing Board but, as the review petition was then returned (because of the pending federal action), we will accept *arguendo* the district court's premise that the federal

action came after the conclusion of any pending administrative proceedings.

The question, then, is whether Maymó can avoid *Younger* abstention by failing to pursue his administrative remedy within the Racing Board. This question, although not identical, is related to the larger question whether, even if Maymó had completed review by the Racing Board, he could have refused to seek judicial review in the state court and instead brought his federal claims to federal court in an injunction action. Needless to say, this issue—essentially an exhaustion of remedies question—is a matter of general importance that could affect an array of state proceedings.

To us, the answer is dictated by *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), and its progeny. In *Huffman*, the Supreme Court said that once a state judicial proceeding had begun, the exhaustion of state judicial remedies was required by *Younger*; despite the formal break between trial and appellate review, the Court deemed the proceeding "ongoing" for *Younger* purposes until the state appellate process was complete. *Id.* at 607-11. This was so even though the state court decision would then likely be preclusive of any new federal lawsuit.

At the time *Huffman* was decided, *Younger* had not formally been extended to state administrative proceedings; and the Court reserved the exhaustion question as to them.[8] But the Supreme Court thereafter extended *Younger* to such proceedings in *Middlesex County Ethics*

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[8] It purported to reserve this issue, citing two ancient Supreme Court cases that allowed federal equity suits to challenge state administrative action. *Huffman*, 420 U.S. at 609 n.21.

Committee v. *Garden State Bar Association*, 457 U. S. 423 (1982), and *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), its premise being that the administrative proceedings were subject to *Younger* because they were "judicial" in character. 457 U.S. at 432-34; 477 U.S. at 627-28. In *Dayton*, the Court further stressed that if the constitutional mistakes were not remedied at the administrative level, state courts would be available to set the matter right. 477 U.S. at 629.

Given such rhetoric and the policy judgments underlying the recent decisions, *Younger* now has to be read as treating the state process—where the administrative proceeding is judicial in character—as a continuum from start to finish. There are exceptions to *Younger* (to which we will return) but, absent an applicable exception, there cannot at any point on the continuum be an automatic right to detour into federal court because unhappy with an initial answer.

The principal author of these "Younger-extended" opinions has been Chief Justice Rehnquist. When, following *Dayton*, he summed up in a concurrence in *New Orleans Public Service Inc. (NOPSI)* v. *Council of New Orleans*, 491 U.S. 350 (1989), he specifically described the *Younger* rule as one that treats a matter as "ongoing" from the administrative proceeding into the state judicial proceeding:

> Nothing in the Court's opinion curtails our prior application of *Younger* to certain administrative proceedings which are 'judicial in nature[';] nor does it alter our prior case law indicating that such proceedings should be regarded as 'ongoing' for the purposes of *Younger* abstention until state appellate review is completed. (citations omitted) (emphasis in original).

This conclusion does little more than spell out what is inherent in *Huffman, Middlesex*, and *Dayton*, taken together; and it is certainly the view taken by three out of four circuits that have addressed the exhaustion question.[9] The majority view—reflected in *O'Neill* v. *City of Philadelphia*, 32 F.3d 785 (3d Cir. 1994)—is persuasive to us:

> We have been given no reason why a litigant in a state administrative proceeding should be permitted to forego state-court review of the agency's decision in order to apply for relief in federal court. Rather, we find the grounds offered by the Supreme Court to support its holding in *Huffman*—that state appellate review of a state court judgment must be exhausted before federal court intervention is permitted—are equally persuasive when considered with respect to state-court judicial review of a state administrative decision.

Id. at 790-91. The opinion continues by quoting portions of *Huffman* and other decisions that reinforce this view. *Id.* at 791. *Huffman* is a reliable guide only where full-fledged state administrative proceedings of a judicial character and, arguably, of a coercive nature, are directed against the federal plaintiff. *See Alleghany Corp.* v. *Haase*, 896 F.2d 1046, 1050-53 (7th Cir. 1990). If Maymó had been summarily suspended by the Racing Administrator and no administrative proceeding had

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[9] *Compare Thomas* v. *Tex. State Bd. of Med. Exam'rs*, 807 F.2d 453, 455-57 (5th Cir. 1987) (holding that exhaustion of opportunities to appeal in state court from adverse administrative decision is not required by *Younger*), with *Majors* v. *Engelbrecht*, 149 F.3d 709, 712-13 & n. 3 (7th Cir. 1998) (holding the opposite), *O'Neill* v. *City of Philadelphia*, 32 F.3d 785, 790-91 & n.13 (3d Cir. 1994) (same), and *Alleghany Corp.* v. *McCartney*, 896 F.2d 1138, 1143-45 (8th Cir. 1990) (same).

been begun, he could have gone directly to federal court to challenge his dismissal. See *Patsy* v. *Bd. of Regents*, 457 U.S. 496, 498, 516 (1982); *Barry* v. *Barchi*, 443 U.S. 55, 59-61, 63 n.10 (1979); *see also Dayton Christian Schs., Inc.*, 477 U.S. at 627 n.2. Admittedly, a line between summary action and full-fledged administrative proceedings that are judicial in nature is bound to be fuzzy.

In *Kercado-Melendez* v. *Aponte-Roque*, 829 F.2d 255 (lst Cir. 1987), a school superintendent (Kercado) in Puerto Rico was terminated after an informal hearing at which she was given a chance to respond to allegations of "incompetence, negligence, insubordination, and improper conduct." *Id.* at 257-58. The termination order specified that it would take effect ten days after receipt, unless Kercado chose to file an administrative appeal to the Board of Appeals of the Public Education System. *Id.* Instead, Kercado filed a federal suit, alleging retaliation for activities protected by the First Amendment. *Id.*

The panel majority held that *Younger* did not apply because Puerto Rico did not require any kind of formal procedure prior to the issuing of a termination order and because all postorder proceedings were within the discretion of the aggrieved party and were not necessary to the order's taking effect. *Kercado Melendez*, 829 F.2d at 260-62.[10] *Kercado-Melendez* does Maymó no good, however, because he was suspended only after full-fledged administrative proceedings. There is a spectrum stretching from

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[10] Judge (now Justice) Breyer dissented, arguing that the termination was not truly complete until after the formal review process—he deemed the termination order merely the beginning of an integrated proceeding—and he thought that in any event *Huffman* still applied. *Id.* at 267-68 (Breyer, J., dissenting).

Huffman to *Patsy* and *Kercado-Melendez* may be in the middle; but Maymó's situation is clearly at the *Huffman* end.

Younger, even where it presumptively applies, is not implicated where the federal claims cannot be raised and resolved somewhere in the state process. *Middlesex County Ethics Comm.*, 457 U.S. at 432. How far the Racing Board would entertain constitutional objections to its regulations or practices is unclear, but the state-court clearly would do so and this is enough. As noted above, in *Dayton* the Supreme Court said "it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." 477 U.S. at 629.

Maymó says that one claim in particular—that Alves harbored bias against him—could not be developed because, in the administrative proceeding involving Clenbuterol, he was not allowed to subpoena Alves to develop that claim and so was limited by a truncated record on appeal. Denial of an opportunity to develop a material issue is a standard basis for overturning an adverse administrative decision, *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985), and Maymó has not persuasively explained why this remedy was inadequate in this case.[11]

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[11] At oral argument, Maymó said (without citation) that the state court had no power to remand to the Racing Board to develop more evidence. But it would take more than general assertion to persuade us that a competent state court with authority to review a disciplinary order lacked other remedies (*e.g.*, setting aside the order) where a material issue had been wrongly foreclosed.

Taking a related but somewhat different tack, Maymó argues that an exception to *Younger* permitted him to go to federal court directly to forestall an administrative action against him conducted by a biased tribunal. In substance, Maymó says that Alves, Cruz, Pacheco, and Álvarez were prejudiced against him and, in addition, that he was singled out for discipline while other trainers similarly situated were not pursued. These facts, he says, he was entitled to develop in an independent action in federal court. His main reliance is upon *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

In *Gibson*, a group of optometrists sued in federal court to enjoin disciplinary proceedings against them by a state board, 411 U.S. at 568-70; and the Supreme Court said that *Younger* did not bar a due process claim that the administrative tribunal was "incompetent by reason of bias [an alleged financial stake in the outcome] to adjudicate the issues pending before it." *Id.* at 577-79. The Court also said: "[n]or, in these circumstances, would a different result be required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceeding." *Id.* at 577.

Gibson was decided only two years after *Younger* began the process of contracting federal-court remedies, but it has never been formally overruled. Further, in *Huffman* itself, the Supreme Court said that "of course" exceptions to *Younger*'s bar remained, mentioning not bias but state proceedings brought "to harass," or "in bad faith," or to enforce a flagrantly unconstitutional statute. 420 U.S. at 611-12. The opinion added, however, that irreparable injury would still be required for an injunction based on such an exception. *Id.* at 612.

The scope and conditions of the various *Younger* exceptions remain uncertain. Underneath the surface is an unspoken policy debate as to how much should be done by federal courts and how far state courts are to be trusted; the Chief Justice' s majority opinion in *Huffman* plays out this debate in a counterpoint with the dissent, joined by three Warren Court veterans. *Compare* 420 U.S. at 608-11 (Rehnquist, J.), *with id.* at 616-18 (Brennan, J., dissenting). About all that is certain is that there is some reason for interim federal court intervention where core constitutional values are threatened during an ongoing state proceeding and there is a showing of irreparable harm that is both "great and immediate." *See Younger*, 401 U.S. at 46.

In all events, *this* case—given its present posture—cannot fall within any rational *Younger* exception. Because the first five-year suspension (based on the Clenbuterol order) has now been immunized from district-court review on grounds independent of *Younger*, only the second (Tramadol) suspension remains; and it has no bite for five years. This makes it impossible to show an immediate threat to Maymó's constitutional rights that would justify an injunction by-passing existing state remedies.

So far as the *Younger* exceptions are concerned with the impact of the state proceeding independent of any final remedy (*e.g.*, to harass), the suspension order has already been entered; so far as the concern is with implementing an order before state review is completed (*e.g.*, the initial injunction against the theater in *Huffman*), Maymó now has five years to complete his administrative and judicial review options. Nor is there any "flagrantly" unconstitutional statute or regulation. *Compare Huffman*, 420 U.S. at 611-13.

This case is not one in which a denial of relief is a comfortable outcome. Maymó offered more than trivial evidence that the medical regime used by the Racing Board is incomplete and was unfairly implemented; the district court thought that the evidence (on a preliminary look) was persuasive. The district court also saw force in Maymó's claims of bias or selective enforcement, although to us this is less clear-cut. Maymó's suit is by no means "totally unfounded, frivolous, or otherwise unreasonable"—the test for awarding fees against the plaintiff who fails in a section 1983 action. *Casa Marie Hogar Geriatrico. Inc.* v. *Rivera-Santos*, 38 F.3d 615, 618 (lst Cir. 1994).

Yet so long as the Administrator is prepared to reinstate Maymó's temporarily dismissed Tramadol appeal, it is not apparent why *Younger's* policy bar should be ignored and state processes bypassed.[12] Conceivably, the district court's findings, which have at least persuasive force, may give Maymó some basis for asking the Racing Board or the state courts in the Clenbuterol case to re-open that matter as well—steps that might vindicate the faith *Huffman* and *Dayton* now place in state proceedings.

The district court's injunctive orders are *vacated* and the matter *remanded* to the district court for proceedings consistent with this opinion. Each side will bear its own costs on this appeal.

It is so ordered.

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[12] Maymó did *not* fail to seek administrative review; he did file a request, which the Administrator returned because of the pending federal court action. If the Administrator now failed to reinstate the review proceeding, there would be a serious question whether state procedures were adequate to protect Maymó's constitutional rights.

United States Court of Appeals

For the First Circuit

No. 03-1141

JORGE J. MAYMO-MELENDEZ,
Plaintiff, Appellee,

v.

JULIO ALVAREZ-RAMIREZ; RICARDO PACHECO-PACHECO; IRBA CRUZ-DE-BATISTA,
Defendants, Appellants.

JANE DOE 02CV2001; CONJUGAL PARTNERSHIP ALVAREZ-DOE; JANE DOE 02CV2001-2; CONJUGAL PARTNERSHIP PACHECO-DOE; JOHN DOE 02CV2001; CONJUGAL PARTNERSHIP DOE-CRUZ; CONJUGAL PARTNERSHIP ALVES-DOE;
JUAN ALVES-RUEDA,
Defendants.

Before Boudin, *Chief Judge*, Torruella, Selya, Lynch, Lipez and Howard, *Circuit Judges*.

ORDER OF COURT Entered: May 4, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having

been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk

By Mark R. Syska Chief Deputy Clerk.

[cc: Messrs: Cuprill-Hernandez, Antonetti-Stutts, Vera-Ramirez, Ms. Landron Guardiola and Ms. Berrios Hernandez]

United States Court of Appeals

For the First Circuit

No. 03-1141

JORGE J. MAYMO-MELENDEZ,
Plaintiff, Appellee,

v.

JULIO ALVAREZ-RAMIREZ, ET AL.,
Defendants, Appellants.

Before

Boudin, *Chief Judge*,
Torruella and Lynch, *Circuit Judges*.

ORDER OF COURT

Entered: May 26, 2004

On motion of appellee Jorge J. Maymó-Meléndez the issuance of the mandate is hereby stayed to and including July 12, 2004, to permit the filing of a petition for *certiorari*. If a petition for *certiorari* is filed within that time, then the mandate is further stayed pending a resolution of the petition by the Supreme Court. If the petition for *certiorari* is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall

continue until disposition of the case by the Supreme Court. Counsel for appellee Maymo-Melendez is directed promptly to notify the Clerk of this court both of the filing of any such petition for *certiorari* and its disposition.

It is so ordered.

By the Court:

Richard Cushing Donovan, Clerk .

By: Julie Gregg
Appeals Attorney.

[Cert. cc: Hon. Jose A. Fuste and Frances Rios De Moran, Clerk, U.S.D.C. of Puerto Rico, cc: Ms. Berrios-Hernandez, Ms. Landron Guardiola, Messrs: Cuprill-Hernandez, Antonetti-Stutts and Vera-Ramirez]

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

JORGE J. MAYMO-MELENDEZ,
Plaintiff,

v.

JULIO ALVAREZ RAMIREZ, his wife, AILEEN MORALES, and their Conjugal Partnership; RICARDO PACHECO PACHECO, his wife ASTRID O'NEILL, and their Conjugal Partnership; IRBA CRUZ DE BATISTA, her husband RAFAEL BATISTA, and their Conjugal Partnership; JUAN ALVES RUEDA, his wife RAFAELA RUIZ, and their Conjugal Partnership,
Defendants.

Civil No. 02-2001 (JAF)
Civil No. 02-2071 (JAF) (Consolidated)

OPINION AND ORDER

This action is brought by Jorge J. Maymó Melendez ("Maymó") pursuant to 42 U.S.C. § 1983 for the alleged violation of his constitutional due process rights, against Defendants Julio Alvarez Ramírez ("Defendant Alvarez"), his wife Aileen Morales and their Conjugal Partnership; Ricardo Pacheco Pacheco ("Defendant Pacheco"), his wife Astrid O'Neill and their Conjugal Partnership; Irba Cruz de Batista ("Defendant Cruz"), her husband Rafael Batista and their Conjugal Partnership; and Juan Alves Rueda ("Defendant Alves"), his wife Rafaela Ruiz and their Conjugal Partnership (collectively, "Defendants"). Plaintiff Maymó moves for a

preliminary injunction. *Docket Document No. 2.* Defendants move to dismiss. *Docket Document No. 25.*

I.

Factual and Procedural Synopsis

Plaintiff Maymó is a trainer of thoroughbred horses who is licensed by the Puerto Rico Horse Racing Industry and Sport Administration ("Administration"), an administrative agency of Puerto Rico charged with "regulat[ing] everything connected with the horse racing sport in the Commonwealth of Puerto Rico." 15 L.P.R.A. § 198(a)(1999). Defendant Alves is the former Racing Administrator for Puerto Rico, and was replaced in that capacity by Defendant Alvarez in June 2001.[1] Defendant Cruz was the Hearing Examiner for the charges leveled against Plaintiff Maymó, and Defendant Pacheco prosecuted the cases. All are being sued in their official and individual capacities.

Given the relative complexity of the facts, we have bifurcated the circumstances of the cases herein. Unless

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[1]The Racing Administrator is the executive and administrative director of all horse racing activities in Puerto Rico. 15 L.P.R.A. 198(k)(1999). A Racing Administrator has the power to "enforce compliance of the racing laws and regulations and the orders and resolutions of the Horse Racing Board," 15 L.P.R.A. 198(k)(1), and has the power to "grant, suspend temporarily, or permanently cancel the licenses of horse owners, jockeys, trainers, grooms, or any type of license or permit connected with horse racing activities." 15 L.P.R.A. 198(k) (2).

A Racing Administrator is "appointed by the Governor, with the advice and consent of the Senate, for a term of four years and until his successor is appointed and qualified." 15 L.P.R.A. 198(j) (1999).

otherwise indicated, the facts are from the Stipulation of Facts. *Docket Document No. 27.*

A. *Clenbuterol cases.*

After a series of races held between June 10 and June 21, 1999, nine horses trained by Plaintiff Maymó were submitted to post-race urine tests to test for the presence of drugs. The tests were positive for Clenbuterol, an active agent of Ventipulmin Syrup. Ventipulmin is a bronchodilator approved by the Food and Drug Administration for the therapeutic treatment of horses suffering from respiratory ailments.

During the period between August 2 and August 17, 1999, Defendant Alves filed ten individual charges[2] pursuant to the Controlled Medication Program ["CMP"].[3] The cases were subsequently consolidated by Defendant Alves, and assigned to Defendant Pacheco for prosecution. Defendant Alves assigned Defendant Cruz as the Hearing Examiner. Hearings on the cases were held on August 8, August 9, September 2, and October 2, 2000. During the hearings, Plaintiff Maymó offered the testimony of several individuals and filed supplementary memoranda. The entire proceedings were transcribed by court reporters.

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[2] One horse tested positive for Clenbuterol twice during the period.

[3] The Controlled Medication Program was promulgated by the Racing Administration. It is described in greater detail *infra*. Section XX (VIII) states the procedures to follow upon a positive result from a testing sample.

Plaintiff Maymó petitioned to depose Defendant Alves for the purpose of attempting to establish Alves' partiality and requested to examine part of the urine still kept by the testing lab. Defendant Cruz denied Plaintiff Maymó's requests. Plaintiff Maymó did not contest the chain of custody of the ten samples or that the results reported by the laboratory reflected the presence of Clenbuterol.

On October 16, 2000, Defendant Cruz submitted her findings' report to Defendant Alves. The report relied on the positive urine test and the presumptions of trainer fault in the statute. *Docket Document No. 2, Exhibit C.* Defendant Cruz found that Plaintiff Maymó had medicated his horses with Clenbuterol in violation of the CMP. On October 26, 2000, pursuant to 15 L.P.R.A. §198(a)(9), Defendant Maymó challenged Cruz' report. On November 3, 2000, Defendant Alves adopted Defendant Cruz' findings of fact and conclusions of law. He suspended Defendant Maymó's license for five years and imposed a $2 750 fine. Plaintiff Maymó petitioned the Racing Board ("Board")[4] on November 9, 2000 for a review of Defendant Alves' decision and presented a motion to stay Alves' resolution, pursuant to 15 L.P.R.A. § 198(m)(1999). A hearing for stay was heard before two of the three members of the Racing Board. The motion was at first denied by a divided vote. Plaintiff Maymó requested that the member reconsider his vote, and his statements in that regard resulted in a request for his abstention, which he acceded

[4]The Racing Board is integrated by three persons appointed by the Governor with the advice and consent of the Puerto Rico Senate. They are appointed for a four year term and may only be removed by the Governor for just cause and after the granting of a hearing. 15 L.P.R.A. 198(c)(1999). The Racing Board is empowered to regulate"everything connected with the Horse Racing Sport." 15 L.P.R.A. 198(e) (1999).

to. The two other members of the Racing Board reconvened, voted, and granted the motion for stay on November 16, 2000. On December 7, 2000, Plaintiff Maymó requested a renewal of his training license for 2001, which was granted by Defendant Alves.

Defendant Alvarez assumed the position of Racing Administrator in June 2001. He requested that both Defendant Pacheco and Defendant Cruz remain under the employ of the Racing Administration as prosecutor and hearing examiner, respectively. Defendants Pacheco and Cruz remained on Plaintiff Maymó's cases.

On April 9, 2001, the Board considered Plaintiff Maymó's petition for administrative review of Defendant Alves' resolution suspending his license. Although the Board's vote was not unanimous, the vote had the effect of sustaining Defendant Alves' decision to suspend Maymó's license. Maymó filed a petition for review of the decision of the Racing Board with the Circuit Court of Appeals, Regional Circuit I of San Juan, Panel IV ("Circuit Court"). On June 21, 2002, the Circuit Court confirmed Defendant Alves' decision to suspend and fine Maymó. Plaintiff's motion to reconsider was denied on August 7, 2002. Plaintiff Maymó filed a petition for certiorari with the Supreme Court of Puerto Rico on September 12, 2002. On October 25, 2002, the Supreme Court of Puerto Rico denied certiorari.

B. *Tramadol cases*

On September 29, 2000, while the administrative hearings were underway on the Clenbuterol cases, one of the horses trained by Plaintiff Maymó tested positive for Tramadol. Charges were filed against Plaintiff Maymó on

November 13, 2000, again with Defendant Pacheco as prosecutor and Defendant Cruz as hearing examiner. The hearings on the Tramadol case were held on January 31, March 7, April 11, and May 1, 2002. On June 10, 2002, Defendant Cruz submitted her hearing report to Defendant Alvarez. Defendant Alvarez adopted the hearing report in full on June 26, 2002, and directed suspension for an additional five years to run concurrent to the five-year period imposed by Defendant Alves in the Clenbuterol cases, and added a $1,000 fine. The suspension was to become effective July 1, 2002. Defendant Alvarez also refered Plaintiff Maymó to the Racing Board, and asked them to consider declaring Plaintiff Maymó a "racing nuisance" . [5]

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[5] A Racing Board may declare

> "any natural or juridical person, who, in its judgment, attempts or threatens, or in any way makes evident his purpose of hindering the normal course of the horse racing sport as a horse racing nuisance, by petition of the Horse Racing Administrator . . . . Provided that in order to make such a determination, the Board shall allow such person the opportunity to testify in his defense at a public hearing, in person or through counsel. Every person who has been declared a horse racing nuisance by the Horse Racing Board, who tries to enter or does enter any racetrack or dependency thereof shall be guilty of a felony, and upon conviction shall be punished by a penalty of not less than five (5) years nor more than ten (10) years of imprisonment, or by a fine of not less than one thousand (1,000) or more than five thousand (5,000) dollars, or both penalties in the discretion of the court.
>
> Any person who has been declared a horse racing nuisance by the Board cannot request to be reinstated in horse racing activities until a minimum term of five (5) years has elapsed from his designation as a horse racing nuisance."

15 L.P.R.A. 198(e)(b)(7). In the pleadings the parties use the term "racing obstruction."

Both Defendant Alves and Defendant Alvarez imposed the penalties against Maymó on the basis that each of the ten Clenbuterol charges constituted individual offenses. Under Section XX (XXII)(A)(3) of the CMP, a person convicted for the third occasion "shall have imposed upon them a suspension of five (5) years and/or cancellation, at the discretion of the Racing Administrator." *Plaintiff's Exhibit 4.*

On June 27, 2002, Plaintiff Maymó filed case number 02-2001 in this court based on the Tramadol charge.

On July 3, 2002, Plaintiff Maymó petitioned the Racing Board for reconsideration of the June 26, 2002 resolution and order regarding the Tramadol case. Defendant Alvarez returned the petition to Plaintiff Maymó on July 11, 2002, because Maymó had filed the aforementioned action in Federal Court.

C. *Procedure before this Court*

We held a hearing on July 3, 2002, and granted a Temporary Restraining Order. *Docket Document No. 11.* We were informed during the hearing that the Puerto Rico Circuit Court had come to an adverse decision against Maymó that would have the effect of lifting the stay on the suspension order from the Clenbuterol cases. *Docket Number 15.* Defendants did not know when the sentence would become effective. Plaintiff Maymó informed the court that he planned to appeal any adverse decision to the Puerto Rico Supreme Court. If, however, the order by the Court of Appeals became effective, Defendants could presumably order the suspension of Plaintiff Maymó's license. The court informed Defendants

that it would be strong proof of bad faith to give this matter the expeditiousness that no other business gets." *Docket Number 15.*

Defendant Alvarez nonetheless suspended Plaintiff Maymó's license on July 11, 2002. Defendants did not inform Plaintiff Maymó of the administrative action by fax, as is customary. *Docket Document No. 33.* Instead, Plaintiff Maymó learned of the action from a local racing reporter who had been faxed a notice of the decision. Deposition of Julio Alvarez Alvarez, pp. 39-41.

On July 14, 2002, Plaintiff Maymó filed case number 02-2071, praying for injunctive relief staying any action on the part of the Racing Administration in regards to either of the pending suspensions. We consolidated Civil Cases 02-2001 and 02-2071.

Plaintiff Maymó asks this court to enjoin the enforcement of his license suspension, to declare the Regulation unconstitutional, and to find that his due process rights have been violated. Additionally, Plaintiff Maymó requests $500,000 in damages for emotional distress. *Docket Document No. 2.*

Defendants counter with a Motion to Dismiss, alleging that: (1) Plaintiff Maymó's action is timebarred; (2) Plaintiff Maymó is obligated to exhaust his administrative options prior to pursuing any federal remedies, (3) abstention by this court is appropriate given pending state proceedings; and (4) Defendants are ultimately cloaked by quasi-judicial or qualified immunity. *Document Docket No. 25.* Were Plaintiff Maymó to succeed in overcoming these procedural hurdles, Defendants argue that Plaintiff Maymó has failed to offer proof of due

process violations, and has failed to meet the standard for the granting of a preliminary injunction. *Id.*

II.

Motion-to-Dismiss Standard Under Rule 12(b)(6)

Under Rule 12(b)(6), a defendant may move to dismiss an action against him based solely on the pleadings for "failure to state a claim upon which relief can be granted...." Fed. R. Civ. P. 12(b)(6). In assessing a motion to dismiss, "[w]e begin by accepting all wellpleaded facts as true, and we draw all reasonable inferences in favor of the [nonmovant]." *Washington Legal Found.* v. *Massachusetts Bar Found.*, 993 F.2d 962,971 (1st Cir.1993). A court may dismiss complaints pursuant to Fed. R. Civ. P. 12(b)(6) "only if it clearly appears, according to the facts alleged, that the Plaintiff Maymó cannot recover on any viable theory." *Correa-Martinez* v. *Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990).

In his complaint, a plaintiff is obliged to allege facts regarding each essential element necessary to entitle him to recovery under an actionable legal theory. *Roth* v. *United States*, 952 F.2d 611, 613 (1st Cir. 1991) (quoting *Gooley* v. *Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988).

We first turn to Defendants' challenges to this court's jurisdiction over Plaintiff Maymó's causes of action.

III.

Analysis

A. Statute of Limitations

Defendants first contend that Plaintiff Maymó's Section 1983 claims are barred by the statute of limitations. The success of this argument depends on identifying the applicable statute of limitations, determining when the statute began to run, and whether it was tolled.

To determine the applicable statute of limitations for this action, we first turn to Section 1983 to determine its provisions. Section 1983, however, lacks an accompanying federal statute of limitations. *See* 42 U.S.C. § 1983. Consequently, we adopt relevant provisions from the analogous statute of limitations of the forum state. *See Wilson* v. *Garcia*, 471 U.S. 261, 266-80 (1985) (directing federal courts in Section 1983 actions to borrow and apply a state's statute of limitations for personal injury cases).

For Section 1983, the most appropriate provision is the statute of limitations for personal injury cases. *See Owens v. Okure*, 488 U.S. 235, 236 (1989). In Puerto Rico, a one-year statute of limitations governs personal injury actions. See 31 L.P.R.A. § 5298(2) (1991). Therefore, we apply the one-year prescriptive period to Plaintiff Maymó's Section 1983 action. See *Rivera-Ramos* v. *Román*, 156 F.3d 276, 282 (1st Cir. 1998).

1. *Date of Accrual*

"Although the limitations period is determined by state law, the date of accrual is a federal law question.

Carreras-Rosa v. *Alves Cruz*, 127 F.3d 172, 174 (1st Cir. 1997) (per curiam); *see also Rivera-Ramos*, 156 F.3d at 282 ("For Section 1983 actions, federal law governs the date on which a cause of action accrues (i.e., when the statute begins to run) while the length of the period and tolling doctrine are taken from local law.") (internal citations omitted). The one-year statute of limitations "begins running one day after the date of accrual, which is the date Plaintiff Maymó knew or had reason to know of the injury. *Benitez-Pons* v. *P.R.*, 136 F.3d 54, 59 (1st Cir. 1998) (internal citations omitted).

The first step "in fixing the accrual is to identify the actual injury of which the Plaintiff complains." *Guzman-Rivea* v. *Rivera-Cruz*, 29 F.3d, 5 (1st Cir. 1994)(citing *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994)). Here, Plaintiff Maymó objects to the suspension of his license on June 26, 2002, the fine imposed, and his referral by the Racing Board as a racing nuisance. He also opposes the concurrent suspension from the Clenbuterol. Plaintiff argues Defendants have systematically acted in violation of due process principles.

a. *Tramadol*

Plaintiff alleges due process violations in the administrative process involving the Tramadol cases. Defendant Alvarez issued the order suspending Plaintiff Maymó's license on June 26, 2002. Plaintiff objects to the suspension of his license for an additional five years, the imposition of a fine, and the allegation that he is a racing nuisance. These injuries became palpable and, therefore, accrued on June 26, 2002, the date that the suspension order was issued. *See Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981)(per curiam). Therefore, this particular incident is not time-barred.

b. *Clenbuterol*

Defendants argue that the one-year period should run from the date of the license suspension for the Clenbuterol cases, November 3, 2000, giving Plaintiff Maymó until November 4, 2001 to file his action. Plaintiff filed his action regarding the Clenbuterol cases on July 11, 2002. Were this court to accept the Defendants' timeline, Plaintiff Maymó's action would be untimely and, therefore, barred under the statute of limitations for Section 1983.

2. *Continuing Violation*

The question then becomes whether Defendants' actions constitute a continuing violation of Maymó's rights. If so, we will consider the Clenbuterol actions as part of Plaintiff Maymó's civil rights claim.

The continuing violation doctrine creates an equitable exception to the statute of limitations when unlawful behavior is alleged to be ongoing. *See Provencher* v. *CVS Pharmacy*, 145 F.3d 5, 13 (1st Cir. 1998). "[T]he theory recognizes that some acts are imbricated, *i.e.*, they involve an interlinked succession of related events or a fully-integrated course of conduct. *Mack* v. *Great Atlantic and Pac. Tea Co.*, 871 F.2d 179, 183 (1st Cir. 1989). In effect, the continuing violation theory allows a plaintiff to prosecute claims that would otherwise be time-barred.

The continuing violation theory, which had its genesis in decisions interpreting Title VII of the Civil Rights Act of 1964, has been applied in a wide variety of circumstances." *Velázquez* v. *Chardon*, 736 F.2d 831, 833 (1st Cir. 1984) (internal citation omitted). The First Circuit

employs the continuing violation theory to evaluate the timeliness of Section 1983 actions. *See id.; see also Muñiz-Cabrero* v. *Ruiz*, 23 F.3d 607, 610 1st Cir. 1994)

To establish a continuing violation under Section 1983, a plaintiff must allege that an unlawful act occurred or that an illegal policy existed within the period prescribed by the statute. *See Johnson* v. *Gen. Elec.*, 840 F.2d 132, 137 (1st Cir. 1988); *see also Velazquez* v. *Chardon*, 736 F.2d 831, 833 (1st Cir. 1984).

Continuing violations are of two types: serial or systemic. *Kassaye* v. *Bryant Coll.*, 999 F.2d 603, 606 (1st Cir. 1993). To establish a systemic violation, a plaintiff must allege that he has been harmed by the application of an unlawful practice or policy that continued or is continuing into the statutory time period. *Muniz-Cabrero*, 23 F.3d at 610; *see also Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-381, 102 S.Ct. 1114, 1125 (1982)(stating that when a plaintiff challenges an unlawful practice which extends into the limitations period, the complaint is timely).

Here, Plaintiff alleges a systemic violation. Plaintiff Maymó suffered and continued to suffer from the application of a Regulation that allowed the Racing Administrator to not only suspend his license for an additional concurrent period, but to enforce the original suspension, and combine both to recommend the permanent deprivation of Plaintiff Maymó's license.

This court is persuaded by the facts alleged that Plaintiff Maymó has successfully alleged a continuing course of impermissible conduct that is based on unfettered discretion on the part of the Racing Administration, application of a Regulation that does not provide due process, and personal animosity towards Plaintiff Maymó.

B. *Abstention and the Exhaustion of Administrative Appeals*

Defendants protest that Plaintiff Maymó has yet to exhaust his administrative appeals, claiming that this is a prerequisite to the institution of a claim under Section 1983. They further argue that this court should abstain from reaching the merits of this case given pending state proceedings, referring to the Puerto Rico Supreme Court appeal pending at the time the first pleadings were submitted. *See Younger* v. *Harris*, 405 U.S. 37(1971).

The United States Supreme Court has held that Section 1983 claimants need not exhaust all of their available state judicial and administrative remedies before presenting their claims in federal court. *Patsy* v. *Florida Board of Regents,* 457 U.S. 496 (1982). However, the *Younger* court "articulated the federal judiciary's obligation to refrain from adjudicating the merits of federal claims where to do so would needlessly inject federal courts into ongoing state proceedings." *Brooks* v. *New Hampshire Supreme Court*, 80 F.3d 633, 637 (1st Cir. 1996). The principles of abstention announced in *Younger* apply with equal force to state administrative proceedings of an adjudicative nature. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (abstention proper where sex discrimination claim was pending before state civil rights commission); *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515(1982) (federal court should abstain from interfering with pending state attorney disciplinary proceedings). Thus, "a federal court must abstain from reaching the merits of a case over which it has jurisdiction so long as there is (1) an ongoing state

judicial proceeding, instituted prior to the federal proceeding (or, at least, instituted prior to any substantial *progress in the federal proceeding*), that (2) implicates an important state interest, and (3) provides an adequate opportunity for the Plaintiff [Maymó] to raise the claims advanced in his federal lawsuit." *Id.*

We examine first whether there are ongoing state proceedings that would demand abstention in the case before this court. The Puerto Rico Supreme Court denied certiorari in the Clenbuterol cases, on October 25, 2002, thus terminating Plaintiff Maymó's state appellate process for those particular charges. Therefore, there are no pending appeals in the Clenbuterol cases. As such, the remaining issue is whether Defendant Alvarez' June 26, 2002 decision to suspend Plaintiff Maymó's license based on the Tramadol charge finalized the state proceedings, or if these are ongoing for the purposes of *Younger*.

We find guidance as to the finality of Plaintiff Maymó's Tramadol case from *Kercado-Melendez* v. *Aponte-Roque,* 829 F.2d 255, 260-261, which differentiates between mandatory and discretionary appeals. In *Kercado-Melendez*, the Plaintiff received notice that her teaching certificate was being permanently revoked and that she was being dismissed as superintendent of a Puerto Rico School District. She was apprised of her right to appeal the cancellation order to the Board of Appeals of the Public Education System, which would stay her termination, and was informed that failure to appeal the order within ten days would make it final and binding. The action by the Secretary of Education resulted in a deprivation that was final unless the Plaintiff chose to pursue a discretionary appeal. Thus, the Court determined that the Plaintiff could not be

> [c]oerced into appearing before the Board of Appeals, but is provided with an administrative remedy should she choose to avail herself of it. Undoubtedly, the administrative appeal scheme here is perfectly adequate for handling the vast majority of teacher dismissals, which ordinarily do not involve federal constitutional claims. But a teacher who alleges that her dismissal was motivated by an unconstitutional purpose need not pursue her administrative remedies within the Commonwealth system, but may proceed directly to federal court to press her claims. This is precisely the holding in *Patsy*.

Id. at 261.

The court added that,

> [t]here is a significant difference between a civil rights plaintiff who seeks to use the federal courts to stop or nullify an ongoing state proceeding in which she is a defendant, and a civil rights plaintiff who has an option to initiate a state proceeding to remedy a constitutional wrong perpetrated by a state actor. In the former case, abstention is appropriate; in the latter, the *Patsy* rule prevails.

Id.

Pursuant to the holding of *Kercado*, while a plaintiff may seek to remedy an allegedly wrongful act in optional state administrative proceedings, he is not required to do so. *Id.* at 262.

The circumstances surrounding Plaintiff Maymó's Tramadol case are indistinguishable from those in *Kercado-Melendez*. As in *Kercado-Melendez*, Plaintiff Maymó received a final and appealable order from the Racing Administrator that informed him of his right to ask for reconsideration of the decision within the administrative agency, and subsequently within the Puerto Rico judicial system. *Docket Document No. 10*. These appeals were not a prerequisite to the finality of the order. Absent an appeal, the order would become final, and his suspension would begin on July 1, 2002.

Therefore, as in *Kercado-Melendez*, there are no ongoing state procedures that would require Plaintiff Maymó to exhaust his administrative appeals, or would require a *Younger* abstention.

C. *Quasi-Judicial Immunity*

Finally, Defendants argue that they are cloaked by qualified or quasi-judicial immunity and that this should bar the suit.

The immunity to be accorded to a defendant is a matter of federal law, *Wood* v. *Strickland*, 420 U.S. 308, 314 (1975), and state immunities and defenses are not relevant to Section 1983 claims. *Howlett* v. *Rose*, 496 U.S. 356 (1990). It is "well settled that neither a state agency nor a state official acting in his official capacity may be sued for damages in a Section 1983 action," *Wang* v. *New Hampshire Bd. of Registration in Med.*, 55 F.3d 698, 700 (1st Cir. 1995) (citing *Johnson* v. *Rodriguez*, 943 F.2d 104, 108). This court is, therefore, unable to grant monetary damages against the Board members in their official capacities.

Section 1983 does allow for monetary damages against officials sued in their individual capacities. *Id.* However, the Supreme Court has recognized that "there are some officials whose special functions require a full exemption from liability." *Butz* v. *Economou*, 438 U.S. 478, 508 (1977). These actors "include judges performing judicial acts within jurisdiction, prosecutors performing acts intimately associated with the judicial phase of the criminal process, and certain 'quasi-judicial' agency officials who, irrespective of their title, perform functions essentially similar to those of judges or prosecutors, in a setting similar to that of a court." *Bettencourt* v. *Bd. of Registration in Med.*, 904 F.2d. 772, 782 (1st Cir. 1990) (internal citations omitted). Courts have since extended quasi-judicial immunity to include officials performing functions closely associated with the judicial process, including administrative hearing examiners and prosecutors. *Wang*, 55 F.3d at 701. This immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have been to the Plaintiff." *Cleavinger* v. *Saxner*, 474 U.S. 193, 200 (1985) (quoting *Bradley* v. *Fisher*, 13 Wall 335 (1872)); *Wang*, 55 F.3d at 702 (Medical board members and counsel are immune from suit on section 1983 claims arising out of their respective judicial, quasi-judicial and/or prosecutorial functions, even though they acted "maliciously and corruptly").

However, quasi-judicial immunity is improper where the official has acted in the "clear absence of all jurisdiction." *Id.* (quoting *Stump* v. *Sparkman*, 439 U.S. 349, 357 (1978)). Immunity is also improper when the officials are acting outside the "outer perimeter" of their sphere of duty. *Bettencourt*, 904 F.2d at 782. "The conduct in question need only be more or less connected to the

'general matters committed by law to his control or supervision' and not 'manifestly or palpably beyond his authority' " *Ricci* v. *Bancshares of Maine, Inc.*, 768 F.2d 456, 462 (1st Cir. 1985) (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)).

We find that Defendants meet the requirements for quasi-judicial immunity. First, as in *Bettencourt*, the Administrators and professional staff here performed in quasi-judicial capacities, weighing evidence, making factual determinations, determining sanctions, and issuing written decisions regarding the sanctions imposed. The circumstances surrounding the denial of a license are antagonistic, and the Racing Board would be subject to numerous suits if quasi-judicial immunity were denied. *Bettencourt*, 904 F.2d at 782 (stating that the denial of a medical license was "likely to stimulate a litigious reaction from the disappointed physician, making the need for absolute immunity apparent"). Finally, the proceedings here were conducted in a similar fashion to those of a court. Plaintiff Maymó was allowed counsel, to call and cross-examine witnesses, and was provided with an appellate process. The focus of quasi-judicial immunity is on the actual proceedings proffered versus the actual effectiveness of the proceedings. Thus, even "assuming a level of malice and bad faith sufficient to poison [the proceedings]," the Racing Administrator, Hearing Examiner and Prosecutor would be absolutely immune from suit in their individual capacities. *Wang*, 55 F.3d at 702.

Plaintiff fails to identify any applicable exceptions to quasi-judicial immunity. The due process challenges here do not support a finding that the Defendants went beyond their jurisdiction or control. The revocation of

Plaintiff Maymó's license was well within the Defendants' scope.

The fact that Plaintiff Maymo may not sue Defendants for damages individually is not fatal to his request for injunctive relief. As such, we consider whether Plaintiff Maymó has fulfilled the requirements for granting a preliminary injunction.

D. *Injunctive Relief*

In the First Circuit, we are directed to employ a four-part framework to determine whether preliminary injunctive relief is appropriate. *R.I. Depit of Envtl. Mgmt.* v. *U.S.*, 304 F.3d 31, 45 (1st Cir. 2002) (internal citation omitted). We consider:

> [F]irst, the likelihood that the party requesting the injunction will succeed on the merits; second, the potential for irreparable harm if the injunction is denied; third, the balance of hardships to the parties if injunctive relief is either granted or denied; and fourth, the effect of the court's ruling on the public interest.

Id. No one factor is dispositive; rather, courts balance all the factors, affording each its appropriate weight under the circumstances of the case. *Hybritech, Inc.* v. *Abbott Lab.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988).

Plaintiff Maymó argues that he meets the requirements for the issuance of a preliminary injunction. In opposition, Defendants maintain that Plaintiff Maymó has not proffered enough facts with which to succeed on his Section 1983 claim, that he will not suffer irreparable

harm, and that the balance of equities favors the denial of injunctive relief.

The following analysis represents our findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). Fed. R. Civ. P. 52(a) (requiring a court to set forth its findings of fact and conclusions of law when resolving a motion for an interlocutory injunction).

1. *Likelihood of Success on the Merits*

Likelihood of success is the main bearing wall of the fourfactor framework." *Ross-Simons of Warwick. Inc.* v. *Baccarat, Inc.*, 102 F.3d 12, 18 1st Cir. 1996) (internal citations omitted). In evaluating this factor, we are determining the probable outcome of the case at hand. *See Cohen* v. *Brown Univ.*, 991 F.2d 888, 902 (1st Cir.). Section 1983 provides " 'a private right of action against a person who, under color of state law, deprives a person of rights secured by the Constitution or by federal law."[6] *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 57(internal citation omitted). To assert a cause of action under section 1983, a plaintiff must allege official conduct. *Id.* A plaintiff must also allege that a defendant's act deprived her of a federally-secured right. *Id.* at 58.

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[6] Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

Here, Plaintiff Maymó satisfies both requirements. First, Defendants do not contest that they are state actors. Second, Plaintiff Maymó maintains that he will be able to show that Defendants are depriving him of his constitutional right to due process. He argues that the Administration promulgated regulations that are impermissibly vague, that Defendants failed to comply with their own rules and regulations, and that this, coupled with the bias of the Racing Administrators, deprived him of his constitutionally guaranteed due process. From Plaintiff's complaint, we discern both procedural and substantive due rights claims.

a. *Procedural Due Process*

Under the Fourteenth Amendment to the Constitution, no State shall "deprive any person of life, liberty, or property, without due process of law." U. S . Const. amend. XIV, § 1. The essential inquiry under the due process clause is whether Plaintiff Maymó was treated fairly. 3 Rotunda & Nowak, § 17.8. The Constitution demands that the state cannot deprive an individual of a significant interest in liberty or property without first warning the individual and providing "an opportunity to be heard at a meaningful time and in a meaningful manner." *Amsden* v. *Moran*, 904 F.2d 748, 753 (1st Cir. 1990) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). Thus, our inquiry centers around "the fairness of the protocol which was employed and the risks of lasting (erroneous) deprivation." *Amsden*, 904 F.2d at 754.

(i) *Property interest*

Plaintiff argues that he has a protected property interest in his license. Property interests are not defined

by the constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Lowe* v. *Scott*, 959 F.2d 323, 334 (1st Cir. 1992) (internal citations omitted).

Plaintiff Maymó has a protected property interest in his racing license under state law. *Ortiz Cruz* v. *Junta Hipica*, 101 P.R.R. 1074 (1973) (stating that a racing license was a protected property interest that could not be taken away without due process of law); *see also Barry v. Barchi*, 443 U.S. 55 (1979) (finding that state law allowed a suspension of a racing license only upon showing of negligence in alleged drugging, and that this created a protected property interest in the Plaintiff Maymó's license). Thus, Plaintiff Maymó has the first prong of a procedural due process claim.

(ii) *Alleged Deprivations*

Plaintiff Maymó contends that he can also satisfy the second prong of a procedural due process claim. He argues that the regulation followed by the Racing Administration is impermissibly vague, confusing, and allowed for arbitrary and discretionary decisions on the part of the Defendants. The regulation in question, the Controlled Medication Program, Section XX ["CMP"], was promulgated under state law and had the force of law. 15 L.P.R.A. § 198(e)(a).[7] Plaintiff points to the following pro-

[7] After public hearings, the Horse Racing Board shall adopt whatever regulations for the Horse Racing Sport it deems necessary, which, once they are approved by the Governor and filed with the Department of State . . . shall have force of law and their violation shall constitute a crime as provided in §198-198s of this title.

cedural defects: (1) inherently contradictory provisions of the CMP that allow and prohibit the administration of medication to horses, (2) behavior by the Racing Administration which contradicts their stated policies,(3) flawed testing methods that lead to erroneous deprivation of licenses, and (4) bias towards the Plaintiff. All these alleged defects, Plaintiff Maymó contends, lead to a flawed license suspension process and hearing that does not comport with minimum due process requirements.

(a) *Provisions of the CMP*

Plaintiff alleges that contradictory provisions of the CMP alternately allow and prohibit drug administration in horses. Defendants counter that the CMP only allows Lasix, a diuretic, to be administered to a horse, and that a "zero tolerance" policy exists for any other drug found during testing. Since Clenbuterol and Tramadol were found in horses trained by Plaintiff Maymó, they maintain that Plaintiff Maymó has violated the CMP's provisions. Under the CMP, a violation imputes fault on the trainer, and absent contrary evidence, the trainer is subject to suspension and fines. *Plaintiff's Exhibit 4. CMP (XX) (X).* However, Plaintiff has thrown considerable doubt as to the validity of the regulation.

The General Provisions of the CMP state the purpose of the regulation, to wit: to protect the integrity of thoroughbred race horses, ensure their health and welfare, guarantee the interest of the betting public, ensure legality of the equine participation in the racing sport, and protect the investment of the horse race fans. *Id.* at XX(I)(1-5). A drug is defined as "any product, substance, medication, pharmaceutical product . . . . with the capacity to stimulate,

depress or in any way affect or alter the natural condition of the racehorse. The forbidden drugs are classified as Class I, Class II, Class III, Class IV, and Class V pursuant to how they are described and characterized in this statute." *Id.* at XX(II) (B) (6). All licensed veterinary physicians have the "responsibility to make sure that the limits of dosage established herein are observed when administering a drug or medication.", *Id.* at XX(III) (B) (7). Further,

> [e]xcept when it is so allowed by this program, no person may administrate or provoke the administration of any drug, medication, or chemical substance or substance of any kind in any form whatsoever, pursuant to how it is established in this document, during the period of forty-eight (48) hours prior to the race in which the horse is registered.

Id. XX (III) (B) (8).

> If a horse requires emergency treatment during the 48 hours before a race, the Authorized Veterinary Physician in charge shall have to submit the report in the prescribed form and the horse shall be withdrawn.

Id. XX(III) (B) (9) (a-b).

Defendants rely on these provisions and allege that Plaintiff has violated the CMP. They point out that the Administration has only established levels for Lasix. As the only drug with established levels, it is the only drug allowed. Since Plaintiff Maymó used drugs outside of Lasix and these registered positive in urine tests, Defendants contend that Maymó has violated the regulation. They argue that the CMP's zero tolerance policy places the onus on Maymó to prove otherwise.

However, Plaintiff points to another provision in the CMP. Section XX(III)(F) states that the authorized administration of drugs shall be allowed as long as:

> 1. The drugs appear in the list of the International Program for the Detection Tests of Drugs & Quality of the International Association of the Horse Racing Commission.
> 2. The concentration of the drug in the urine or blood shall not exceed the limits established and published for the same by means of an order regarding the matter from the Horse Racing Board.
>
> 3. The administration of the drug shall be supervised and authorized by an Official Veterinary Physician or an Authorized Veterinary Physician and shall not exceed the limits established and published for it.
>
> 4. It shall be the responsibility of the veterinary physician who administrated, authorized or supervised the treatment to make sure that the effective regulations are complied with.

Plaintiff's Exhibit 4.

Plaintiff Maymó submits that this part of the CMP suggests that drugs may be administered to the horses, and that this is consistent with not only the purpose of the Regulation, but is verified by the practice of the Official Veterinarians. To disallow any drugs, he argues, would make it the general practice of the Racing Administration to outlaw all medication, from those widely prohibited to the innocuous and therapeutic, which would ultimately be to the detriment of the horses themselves.

Dr. Luis Garcia-Passalacqua ("Dr. Passalacqua"), a former Racing Administrator, member of the Racing Board, and a drafter of the original CMP, testified that it was not the intention of the drafters to just authorize Lasix. Instead, "the intention of the board always was to make the Controlled Medication Program a complete scope program similar to the one approved and used by most of the jurisdictions of the United States." *Tr. of Hearing, October 1, 2002, p. 137.* Dr. Passalacqua confirmed that it was their intention to add other medications, with respective withdrawal times and detection levels. *Id.* He concluded that there was

> [n]o way that a Controlled Medication Program could be complete, valid, and applicable without an indication of the limits of dosage of any of the drugs or medications; otherwise, those which are exposed on a daily basis to the use of these medications or drugs would be those - either veterinarians or trainers would be exposed to sanctions for using improper or unauthorized drugs.

Id. at 137-138.

Moreover, Plaintiff points out that the Official Veterinarian's actions support the view that the Administration did not intend to actually prohibit all drugs outside of Lasix. Under the CMP, Official Veterinarians are "veterinary physician[s] with effective license for the legal exercise of veterinary medicine in Puerto Rico." *Plaintiff's Exhibit 4, CMP XX(II) (16).* They are "appointed by the Racing Administration for the rendering of professional services to the [Administration] under the provisions of the Racing Act, the effective Racing Regulations and those orders or resolutions issued

by the Racing Board or by the Racing Administrator." *Id.* Official Veterinarians are also charged with extracting and maintaining the custody of samples from winning horses. *Plaintiff's Exhibit 4, CMP XX(V) (F).*

Dr. Luis Garcia Blanco, a veterinarian authorized to practice at the racetrack, testified that the Official Veterinarians had compiled a list of medications with withdrawal times for different drugs. *Tr. of Hearing Oct. 2, 2002, pp. 405-406.* The list informed veterinarians as to how many days ahead of a race they would have to discontinue administration of a particular drug so as to avoid a positive result in the after-race samples. *Id.* Dr. Garcia testified that drugs were added to the list at veterinarian's requests. *Id.* Omeprazole, Phenytorin, Ventipulmin (Clenbuterol) and aspirin were added to the list at his request. *Id.* The list did not establish detection levels for samples. *Id.*

The Chief Official Veterinarian, Dr. Lemuel de Jesus, confirmed that he had crafted an unofficial, internal, and unpublished withdrawal times list, and also testified that the Administration realized that these guidelines existed. *Tr. of October 3, 2002, p. 581.* The list was based on independent veterinarian research. Dr. de Jesus testified that Defendant Alvarez asked him to compile a more comprehensive internal thresholds list for publication so as to avoid charges of dishonesty or false accusations. *Id.*

We find Plaintiff's arguments and proof persuasive. The unofficial list established withdrawal times for therapeutic drugs in an effort to fill in the blanks of the CMP. The Administration knew of the existence of the list and appeared to ratify the process of setting ad-hoc guide-

lines to supplant the CMP. Since the list was maintained by the Official Veterinarian, in charge of the actual after-race sampling process, it also had the tacit imprimatur of the Administration in the eyes of the trainers and veterinarians. Plaintiff Maymó has shown that the Administration, exclusively in charge of thoroughbred racing, had promulgated a regulation that contradicted itself. Without set withdrawal times, the zero tolerance policy of the Administration had the perverse effect of preventing trainers and owners from medicating their horses, making illegal both clearly prohibited and therapeutic drugs. This is not only against common sense, but clearly runs afoul of the General Provisions and spirit of the Regulation itself.

(b) *Flawed testing methods*

Plaintiff Maymó argues that the CMP's sample testing process compounds the arbitrary nature of the license deprivation. Plaintiff Maymó's expert witness, Dr. Steven Barker, testified that the drugs in question depleted quickly in blood and would, therefore, have no effect on the performance of the horse, but could be found in urine weeks after being administered. *Tr. of Hearing, October 1, 2002, p.283.* Dr. Barker testified that Clenbuterol depleted twenty-four hours after being administered, and yet could be found in urine twenty-one days afterwards. *Id.* Blood testing measures actual levels of medication present in the system of a horse and would definitely establish if the horse was being medicated within a certain established period. *Id.* at 280-282. Testing urine, he argued, is an imperfect proxy for determining if the medication is still having an effect on the horse, since, by definition, the medication levels found in urine represent the medication that has already been eliminated from the horse's circulatory system. *Id.* at 284.

Here, the Administration did not conduct confirmatory blood tests, nor did it establish threshold urine levels correlating the levels in urine with levels in blood. The testing done by the Defendants could not establish whether the horse was racing under the influence of prohibited medications, risking overbreadth in license deprivations.

While Dr. Barker's testimony called into question the validity of testing urine instead of blood, Dr. Martí Ortiz' testimony impugned the validity of the urine testing actually done by the Administration. Dr. Marti Ortiz is the Director of the Chemical Forensics Lab of Puerto Rico, the lab contracted to perform the tests in question. He testified that only semi-quantitative analyses were conducted. A semi-quantitative analysis gives an approximate range of concentrations of the tested drug in urine. *Tr. of Hearing, October 1, 2002, p. 228.* He acknowledged that the semi-quantitative analysis performed by the lab was prone to error. *Id.* Furthermore, he admitted that, while he could identify a concentration range, he could not say with certainty that the horses had been medicated Clenbuterol or Tramadol within forty-eight hours of the race. *Tr. of Hearinq September 30, 2002, p. 226.* In fact, the horses could have been medicated much earlier. *Id.* The only way that he could undertake meaningful quantitative analysis was if urine threshold limits were established by the Racing Administration. *Id.* In effect, even a precise concentration level in urine is meaningless without an established threshold level that informs the laboratory technician that the concentration is consistent with administration of the medication in question within a forty-eight hour period.

The testimony of Dr. Barker and Dr. Martí Ortiz is consistent with Dr. Passalacqua's testimony that a precise

quantitative reading would have no meaning if the Administration did not set threshold levels that would state whether or not the amount found was a violation of the CMP. *Id.* at 137.

Furthermore, Dr. Marti Ortiz attested that the test utilized was also under-inclusive. *Tr. of Hearing, Oct. 1. 2002, pp. 234-236.* While the test utilized could detect the possible presence of Solinase (otherwise known as Fentanyl), a narcotic which is absolutely prohibited in many jurisdictions, it could not confirm its presence. *Id.* The lab could, therefore, not report the sample as a positive. *Id.* Paradoxically, the test used by the lab was both over-inclusive in its inability to discern precise administration times for drugs, and under-inclusive in the scope of drugs detected.

The Racing Administration cannot demonstrate, with certainty, that Plaintiff medicated his horses within the forty-eight hour zero-tolerance limit. They also cannot show that they have uniformly prohibited the administration of any drugs outside of Lasix. Plaintiff has proffered evidence that the Administration has used trace levels of drugs as a proxy for a violation, despite testimony by the Plaintiff's expert witness and their own Laboratory technician that this is not only misleading, but prone to error.

Defendants argue that, notwithstanding the assertions of Plaintiff Maymó, trainers must consult with Veterinarians to medicate their horses, and that they need not be privy to withdrawal times. They argue that the informal guidelines drafted by the Official Veterinarians were for their internal edification and need not be ratified or published for the trainers. However, this

court fails to see how this is at all consistent with the policy of absolute responsibility imposed on the trainers, particularly when the Regulations allow trainers to medicate their horses under veterinarian supervision. *Plaintiff's Exhibit 4. CMP XX(V) (F) (3).* Furthermore, testimony at the hearings shows that the sheer ratio of horses to veterinarians demands that trainers take a more active role in the treatment of their horses. *Deposition of José Alvarez Alvarez. p. 187.* Without knowledge of withdrawal times, trainers depend on oral communications from veterinarians, and risk a positive sample and subsequent suspension or cancellation of their license.

(c) *Meaningful hearing*

Furthermore, Plaintiff argues that the Administration failed to provide him with a fair hearing. Plaintiff Maymó charges that the hearing was merely an official imprimatur for a deeply-flawed investigative and hearing process, compounded by bias against Plaintiff.

Defendants argue that, regardless of any alleged due process violations, an accused trainer may ask for a confirmatory urine test at a laboratory facility to confirm the presence of a drug. A trainer may also have a hearing where, through the presentation of evidence and witnesses, and the presence of counsel, they may contest the charges. The pre-deprivation procedure used by the Administration, they suggest, fully comports with minimum due process standards. Also, they posit that a trainer has adequate state remedies. Plaintiff Maymó may proceed with appeals in his Tramadol case, for example. To succeed in his claims, Defendants contend that

Plaintiff would not only have to show that the administrative hearing was deficient, but that state appellate procedures are inadequate as well. *Docket Document No. 15.*

Defendants misconstrue Plaintiff's due process challenge. A hearing compliant with due process encompasses not only the opportunity to present evidence through counsel, but a fair and meaningful proceeding as well. Although Plaintiff charges Defendants with "arbitrary decisions" in violation of the Regulation, the substance of the complaint is directed at the CMP itself. This is a distinct proposition from due process violations occasioned by random and unauthorized departures from state laws.

The Supreme Court has ruled that it is fundamentally impossible for the state to predict random and unauthorized departures from established procedures. Therefore, "[w]hen a deprivation of a property interest is occasioned by random & unauthorized action by state officials, the [Supreme] Court has repeatedly emphasized that the due process inquiry is limited to the issue of the adequacy of the postdeprivation remedies provided by the state." *O'Neill* v. *Baker*, 210 F.3d 41 (1st Cir. 2000). There is "no denial of procedural due process, even by the official,' where the prerequisites of random and unauthorized conduct and adequate post-deprivation remedies are met." *Id.* at 50.

Here, the procedures used were authorized by the CMP. *See Zinerman* v. *Burch*, 494 U.S. 113, 136 (1990). Under Puerto Rico law, the Administration was charged with license regulation, and was delegated the authority

to enact regulations in that regard. Defendants were "delegated the power and authority to effect the very deprivation complained of," the license suspension. *Zinerman*, 494 U.S. at 136-138. They chose to promulgate a regulation that is essentially contradictory, incomplete, and allows for overbreadth and arbitrary discretion in license deprivations.

Further, we find it important to note that the Puerto Rico Supreme Court objected to a zero-tolerance standard which automatically suspended a trainer upon a positive result from testing. The Supreme Court of Puerto Rico stated that:

> [I]t is beyond question that the person who freely takes the employment of horse trainer enters, through an act of his sole free will, a field regulated by the rules and regulations necessary to protect the public from gamblers or bookies. But at the same time that person is exercising his right to obtain a lawful employment from which he will derive the support and welfare of for the members of his family, reason why the action should not turn him into a helot deprived of the basic guarantees of the due process and equal protection of the laws. The public policy directed to maintain the cleanliness of the game in the racetracks, is as respectable as man's ambition to earn his livelihood in one oft he occupations offered by his country.
>
> The attribution of absolute responsibility without the right for defense is a rare and obscure figure in our judicial system . . . . It is like a prehistoric bird watchful in view of a transformed ecology.

> A basic notion of the Law, in the full extent of its force and protection of man in the presence of Art. 1104 of the Horse Racing Regulations, leads us to reject the tremendous difference existing in the means of defense between the person charged with an offense to the social order due to the negligence in said person's work and another charged with murder, even recognizing that the constitutional guarantees operate with greater strictness when liberty or life are at stake.
>
> The constitutional right to the due process of law requires the granting of a hearing, after a timely and adequate notice, right to be heard being confronted with the witnesses for the prosecution, and to present evidence and arguments in his defense.

Ortiz Cruz v. *Junta Hipica*, 101 P.R.R. 1074 (1973).

Here, Plaintiff's only possible defense was to prove that another person was responsible for the medication of the horses. Thus, the regulation ratified a practice of imposing absolute responsibility upon a trainer, rendering the hearing a mere formality.

Puerto Rico has delegated the responsibility regarding licensing regulations to the Racing Administration. The Supreme Court of Puerto Rico cabined that discretion by requiring that the regulation had to comport with due process, could not have an absolute responsibility standard, and must allow for the presentation of meaningful evidence on the part of the trainer. Plaintiff has submitted enough evidence to show that the Regulation here, the CMP, does not comply with those requirements.

It is beyond the scope of this preliminary injunction to speculate about a regulatory scheme that grants a trainer the best evidence with which to refute the presumptions of the Racing Administration. There is no need. The Racing Administration has promulgated rules without a basic procedural minimum of fairness. For the forty-eight hour rule touted by the Defendants to have any credence, it is imperative that the Racing Administration show that it has any meaning outside of the black and white text of the Regulations. Without more proof that the CMP was adequate, Plaintiff's arguments of due process violations are likely to succeed.

(d) *Bias*

Plaintiff Maymó claims that the arbitrary and vague Regulations were compounded by bias on the part of the Defendants. The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer. *Gibson* v. *Berrybill*, 411 U.S. 564, 569 (1973). "Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975).

Thus, a procedural defect arises when the decision makers have prejudged the facts to such an extent that their minds are irrevocably closed before actual adjudication.

> [But a contention of bias] must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, ... [there is] such a risk of actual bias or prejudgment that the practice must be forbidden if

> the guarantee of due process is to be adequately implemented.

Withrow v. *Larkin*, 421 U.S. at 47; see *Schweiker* v. *McClure*, 456 U.S. 188, 196-97 (1982) (citation omitted).

(e) *Defendant Alvarez*

Plaintiff Maymó first points to Defendant Alvarez' comments during a trainer meeting in June 2001. Julio Díaz, a trainer present at the meeting, testified that Defendant Alvarez said that he was there to clean up the sport of racing in Puerto Rico, and "that there was one trainer who had ten positives in a package and one more and that he would have already declared this trainer to be a nuisance and that the trainer had to do what he needed to do." *Tr. of Hearing, September 30, 2002; p. 115.* This meeting occurred six months prior to the first day of hearings on the Tramadol case, and a full year before Defendant Alvarez' order to suspend Plaintiff Maymó and referral to the Racing Board as a "racing nuisance". When asked about the comments during his deposition, Defendant Alvarez claimed that he was not referring to Maymó, although he did admit that Maymó was the only trainer with those circumstances and that, had he made that comment, he was not "lying if he mentioned him because it was the truth." *Deposition of Julio Alvarez Ramirez pp. 143-144.*

Plaintiff Maymó also claims that Defendant Alvarez did not participate in his trophy ceremonies, as is customary in the high-profile races in Puerto Rico. *Docket Document No. 2.* Defendant Alvarez did not proffer a rationale as to why he gave Plaintiff such disparate treatment. *Deposition of Julio Alvarez Ramírez.*

Defendant Alvarez also did not file charges against a trainer of three thoroughbreds that tested positive for Phenylbutazone or Oxyphenbutazone when they raced on July 4, 2002. Plaintiff pointed out that the horses' trainer in those cases happens to be Defendant Alvarez' brother-in-law. *Tr. of September 30, 2002, pp. 55-56.* Defendant Alvarez claimed that a moratorium on sanctions was declared because the Racing Board was in the process of ratifying guidelines that would set Phenylbutazone levels and would remove the drug from the zero-tolerance list. *Tr. of October 2. 2002, pp. 355-356.* However, Plaintiff Maymó persuasively pointed out that the new CMP guidelines would not become active until August 1, 2002, and that the set tolerance at that time was still zero. The action of setting a moratorium was an inequitable action that implies that there was discretion over the application and enforcement of the guidelines. Defendant Alvarez' argument only highlights the alleged bias against Plaintiff Maymó.

(f) *Defendant Cruz*

Plaintiff also alleges that Hearing Examiner Cruz tipped the scales in favor of suspending his license. He points to her creative rewording of the Regulations regarding the licensing of the laboratory performing the testing. During the Racing Administration's hearing, Plaintiff Maymó protested that Defendants did not comply with the Regulation's requirements that they use an accredited lab when testing samples. The CMP states that:

> [t]he primary testing laboratory may be private, recommended by the Horse Racing Administration or

> the AIDH Laboratory, if it exists. In any of the cases, it may be required by the Horse Administrator or by the Horse Racing Board that the Laboratory be accredited by the International Association of Horse Racing Commissioners (ARCI) or any other entity provided by these. If it is not accredited, a maximum of a year may be granted in which to endeavor and fulfill with said requirement.

Plaintiff Maymo's Exhibit 4, p. 49.

Plaintiff Maymó argues that the statute demands that the lab contracted for the purpose of testing samples either be accredited, or gain accreditation within the year. In his testimony, Dr. Luis M. Garcia Passalacqua, a former President of the Racing Board and one of the drafters of the Controlled Medication Program, testified that the University of Puerto Rico lab was contracted with the explicit condition that the lab be accredited within one year of being contracted. *Tr. of September 30. 2002, p. 157, 161.* According to Dr. Passalacqua, the Board granted an extension of two years given the lab's problems with obtaining accreditation. Dr. Garcia Passalacqua also testified that the lab was to conduct quantitative testing of samples, as is done in other states and jurisdictions where the Uniform Rules of Racing of the American Racing Commissioners International for controlled medications are followed. *Id.* at 124-130. Puerto Rico intended to fully adhere to these standards but failed to do so. *Id.* at 130-132. In fact, and in anticipation of compliance with quantitative testing, the testing fee per sample was raised from around $24 a test to $90 a test. *Id.* at 141.

In her report to Defendant Alvarez in the Tramadol case, on which Defendant Alvarez admittedly

relied on when imposing the fiveyear suspension and fine, Hearing Examiner Defendant Cruz cited the CMP as stating that:

> The primary test laboratory may be private, recommended by the Racing Administrator of the AIDH Laboratory, this exists. In any of the cases, it may be required on the part of the Racing Administrator or by the Racing Poard that the laboratory be accredited by the Association of Racing Commissioners International (ARCI) or any other entity that these provide. It is not mandatory. If it is not accredited, a maximum of one (1) year may be granted in which to endeavor and comply with said requirement. No evidence was presented that it had been required.

Translation of the Report of the Hearing Examiner, Plaintiff Maymó's Exhibit 4, p. 49. [emphasis ours].

The citation was presented in a block format and was in bold type, as were the other citations in her report.

Plaintiff contends this is proof of Defendant Cruz', bias and her inability to objectively consider the facts prior to her decision. In her deposition, the Hearing Examiner simply stated that this was an error. *Deposition of Defendant Irba Cruz de Batista, p.69.* However, Defendant Cruz has been a Racing Examiner since 1993. She has the extensive experience with the CMP, and used this citation as one of the reasons to dismiss Maymó's complaints. In addition, Defendant Alvarez relied on the report when assessing Maymó's claims of Regulatory violations and lack of due process.

Defendants aver that a resolution by the

Administration changed the laboratory licensing requirement, and that, while not a literal transcription of the regulation, Defendant Cruz' changes reflected the status of the licensing requirement after the resolution. Evidence of that resolution was not submitted to this court. Furthermore, Defendant Alvarez admitted in his deposition testimony that an order cannot amend the Regulation, and that it was his understanding that public hearings had to be held in order to effectuate an official change to the CMP. *Deposition of Julio Alvarez Ramirez, p. 157.*

Finally, we note that Defendants had only once before charged someone with a five-year suspension. In that case, the Defendant was a foreign national charged with two Class I drugs (no therapeutic value) who abandoned his defense and the jurisdiction. *Stipulation of Facts No. 94.* While certainly not enough by itself to prove bias, this certainly raises questions of parity and proportionality that may be further clarified at trial.

This court finds Plaintiff Maymó is likely to succeed in overcoming presumption of fairness and in establishing that Defendants' conduct constituted impermissible bias. Plaintiff does not point to perfunctory allegations of bias without evidentiary support, but buttresses his allegations with affidavits and deposition testimony. Specifically, Plaintiff has provided evidence of Defendant Alvarez' stated animosity towards the Plaintiff, months before a trial on the Tramadol case before him had even begun. Plaintiff also provided evidence of disparate treatment, from Defendant Alvarez' behavior during tournaments to the selective moratorium. Plaintiff Maymó also offered evidence that this bias may have extended to the hearing process, since Defendant Cruz' rewording of the

statute is inconsistent with her experience. Plaintiff Maymó has proffered sufficient evidence to suggest the presence of bias in the proceedings. This evidence of bias, coupled with the procedural defects of the CMP itself, which are discussed supra, indicate that Plaintiff is likely to succeed on the merits of his procedural due process claim.

b. *Substantive Due Procees*

Plaintiff Maymó also raises a substantive due process claim. Substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property rights in violation of state law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or "abuse of government power that shocks the conscience, or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28,31 (citing *Committee of U.S. Citizens in Nicaragua* v. *Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988)).

We find Plaintiff's claims of substantive due process violations persuasive. While Puerto Rico has clear interest in maintaining the integrity of horse racing, the Regulation promulgated by the Administration is over broad in its license suspensions. The testing procedures merely test for the presence of a drug and impute fault with that alone. Notwithstanding the Defendants' protestations of zero tolerance within forty-eight hours, they do not require quantitative testing that would precise the level of the drug in urine, and they have not established scientific threshold levels that would show, through comparison and with greater precision, that the drug level

found was too high to have been administered beyond the forty-eight hour cutoff. Finally, testimony at trial showed that the testing was also under inclusive.

The CMP was promulgated with a different purpose in mind. Instead of a trustworthy medication program, the CMP has proven to be unreliable, under-inclusive in its testing scope, and overinclusive in its indiscriminate effect on trainers. In its unfinished state, it is not rationally related to the state interest it was meant to serve, and is unduly punitive to trainers. As such, the CMP violates substantive due process principles.

2. *Irreparable Injury*

To award equitable relief, this court must conclude that Plaintiff Maymó would suffer an irreparable injury in the absence of an injunction. To establish irreparable harm, it is typically enough for a Plaintiff to show that his legal remedies are inadequate. *Ross-Simons*, 102 F.3d at 18 (internal citations omitted). "If the Plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages irreparable harm is a natural sequel." *Id.* at 19 (internal citations omitted).

Plaintiff Maymó claims he will suffer immediate irreparable harm if Defendants are not restrained. He alleges that he will lose up to ninety-five percent of the horses under his care. Defendants seemingly accept that he would lose a large percentage of the horses he trains. They argue that, even if Plaintiff Maymó were to lose ninety-five percent of the horses, "he may obtain another source of income, considering that he is the best horse trainer in Puerto Rico and it is possible to supervise horses without entering the restricted areas." *Docket Document No. 34.*

Defendants also contend that "if Plaintiff succeeds in further proceedings any loss of income can be measured ultimately in monetary terms." *Id.*

Plaintiff Maymó need not lose all his business to prove irreparable injury. As stated supra, it is enough if he shows that his legal remedies are inadequate. *Ross-Simons*, 102 F.3d at 18. The loss of ninety-five percent of his clientele is certainly devastating, and would be hard to measure, particularly since Plaintiff's salary is partially based on percentages of racing wins and losses. Furthermore, Plaintiff has offered convincing proof that he would have to turn over the stalls assigned to him at the racetrack immediately upon suspension. Plaintiff Maymó will not only suffer monetary loss, but the potential loss of a stable full of clientele that will not be able to stall their horses on racetrack grounds if they choose to keep him as their horses' trainer. It is not clear that Maymó would be able to recoup this loss were his suit to succeed. Moreover, under reciprocity rules, Maymó will not be able to train in any racetrack in the United States or in foreign jurisdictions that honor reciprocity, which includes nearby Santo Domingo. *Tr. of September 30, 2002*. Maymó is, therefore, subject to immediate and irreparable harm if his license is suspended pending trial, and has satisfied the second factor of the preliminary injunction test.

3. *Balance of Equities and Public Interest*

To award a preliminary injunction, a court must find that "the harm to Plaintiff would outweigh the harm the defendant would suffer from the imposition of an injunction." *A.W. Chesterton Co. Inc.* v. *Chesterton*, 128

F.3d 1, 5 (1st Cir. 1997). A Plaintiff must also show the effect of the ruling on the public interest. *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 45.

Defendants conflate the balance of hardships and public interest analysis, claiming that a preliminary injunction would "supersede the interest of the Horse Racing Industry as it injects millions of dollars to the education of our children in Puerto Rico. Also the Racing Administration has to guarantee [sic] the public the correctness of the racing industry and betting in Puerto Rico." *Docket Document No. 34.*

It appears from the claims before us that the Racing Administration is being over-inclusive in their license suspensions, while at the same time being under-inclusive in the scope of testing and the drugs detected. We fail to see how this preserves the goals of the Administration, let alone the public interest. Where the state is also abrogating individual rights in an irrational manner, the balances tip in the individual's favor. Therefore, we find that Plaintiff has satisfied the third and fourth factors of the quadripartite preliminary iniunction standard. Since all four factors weigh in Plaintlff's favor, it is appropriate to issue a preliminary injunction to secure Plaintiff's rights.

IV.

Conclusion

In accordance with the foregoing, we GRANT Defendants' Motion to Dismiss Plaintiff's claims for monetary damages on the grounds that Defendants are cloaked in quasi-judicial immunity. Given this court's

decision on quasi-judicial immunity, we ORDER the Plaintiff to show cause as to why we should not dismiss the Defendant spouses and conjugal partnerships from this case. We find, however, that Plaintiff's claims are not time-barred, that exhaustion and abstention are not appropriate in this case, and that Plaintiff has stated a claim under 42 U.S.C. § 1983. We, therefore, DENY Defendants, motion to dismiss on those grounds.

We also find that Plaintiff Maymó has demonstrated that he is likely to prevail on the merits of his Section 1983 claim and will suffer irreparable injury if a preliminary injunction is not granted.

We, therefore, GRANT Plaintiff's motion for a preliminary injunction.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of November, 2002.

s/JOSE ANTONIO FUSTE
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 02-2001 (JAF)

Civil No. 02-2071 (JAF)
(Consolidated)

JORGE J. MAYMO-MELENDEZ,
Plaintiff

v.

JULIO ALVAREZ RAMIREZ, his wife, AILEEN MORALES, and their Conjugal Partnership; RICARDO PACHECO PACHECO, his wife ASTRID O'NEILL, and their Conjugal Partnership; IRBA CRUZ DE BATISTA, her husband RAFAEL BATISTA, and their Conjugal Partnership; JUAN ALVES RUEDA,his wife RAFAELA RUIZ, and their Conjugal Partnership,
Defendants.

ORDER

The Opinion and Order issued on November 26, 2002, should be corrected as follows:

(1) P. 6, 1. 21, where it reads "concurrent", it should read "**consecutive**".

(2) P. 6, 1. 24, the following phrase should be added after "2002": "**and would expire on June 30, 2007.**"

(3) P. 26, 1. 2, after the word "due", the word "**process**" should be inserted.

(4) P. 31, 1. 11, where it reads "Dr.", it should read "**Eng**."

(5) P. 31, 11. 11-12, the phrase "**a former Racing Administrator**" should be **deleted**.

(6) P. 31, 1. 19, where it reads "Dr.", it should read "**Eng**".

(7) P. 32, 1. 20, where it reads "Luis", it should read "**José**".

(8) P. 36, 1, 19, the word "solinase" should be shall be substituted by the word "**Sublimaze**."

(9) P. 37, 1. 7, the word "their", shall be substituted by "**Defendants**".

(10) P. 40, 1, 20, the word "oft", shall be substituted by the phrase "**of the**".

(11) P. 44,1, 15, the following phrase shall be aded between the words "**be**" and "**Defendant**": "**the trainer of the horses of**".

IT IS SO ORDERED.

San Juan, Puerto Rico, this 6th day of November, 2002.

[signature]
JOSE ANTONIO FUSTE
U.S. District Judge

IN THE PUERTO RICO SUPREME COURT

No. CC-2002-678 Certiorari

Jorge J. Maymo-Melendez
Plaintiff-Petitioner

Vs.

Juan A. Alves-Rueda, Racing Administrator
Defendant-Respondent

RESOLUTION

In San Juan, Puerto Rico, on October 25, 2002.

The petition for certiorari is hereby denied. Moreover, the writ filed is in crass violation of Rule 40(b) of the Court Regulation in regard to font size and spacing.

So decided by the Court and certified by the Supreme Court General Clerk. Chief Justice, Mr. Andreu-Garcia, and Associate Justice, Mr. Fuster-Berlingeri, did not intervene.

(Signed)
Patricia Otón-Olivieri
Supreme Court Clerk

[Stamp]

IN THE PUERTO RICO SUPREME COURT

No. CC-2002-678 Certiorari

Jorge J. Maymó-Meléndez
Plaintiff Petitioner

Vs.

Juan A. Alves-Rueda
Racing Administrator
Defendant Respondent

RESOLUTION

In San Juan, Puerto Rico, on December 6, 2002

The First Motion for Reconsideration filed in this case is denied.

So decided by the Court and certified by the Supreme Court General Clerk. Associate Justice, Mr. Rebollo-López, did not intervene. Associate Justice, Mr. Fuster-Berlingeri, does not intervene.

(Signed)
Patricia Otón-Olivieri
Supreme Court Clerk

[SEAL]

28 U.S.C. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

15 L.P.R.A. §198e

(a) The Horse Racing Board is empowered to regulate everything connected with the Horse Racing Sport. After public hearings, the Horse Racing Board shall adopt whatever regulations for the Horse Racing Sport it deems necessary, which, once they are approved by the Governor and filed with the Department of State pursuant to the provisions of prior §§ 1041 et seq. of Title 3, known as the "Rules and Regulations Act of 1958", present §§ 2101 et seq. of Title 3, known as the "Uniform Administrative Procedures Act", shall have force of law and their violation shall constitute a crime as provided in §§ 198-198s ofthis title.

(b) The Horse Racing Board shall have the power, among other things:

(1) To establish the requirements that every racetrack should meet, in its judgment, to operate as such; to establish the terms and conditions for the compliance of said requirements; to extend provisional licenses for the term granted to the racetrack owners to meet the requirements established by the Board; to cancel any license issued provisionally to their holders if the terms are not complied with; to exact other requirements besides those established originally; to guarantee the public safety, reliability, honesty and integrity of the horse racing sport.

(2) To expressly authorize the days and places that each racetrack shall hold thoroughbred horse races in Puerto Rico, and may transfer the place and sites indicated therefor. Provided, That the Board shall authorize a minimum of one hundred and eighty (180) racing days each calendar year. The racing days shall be reasonably divided between

the racetracks, keeping the general welfare of horse racing in mind at all times.

(3) To prescribe the rules by which the holding of horse races shall be governed, by the approval of a plan that shall be known as the "Racing Plan", and which will serve as a guide and manual for the Racing Secretary to prepare the overall conditions for the monthly programming of races. It shall adopt a Special Horse Racing Plan for native horses, which will increase the number of races for native horses.

(4) To regulate everything related to the manner that authorized bets should be made. The Board shall hold public hearings to authorize any type of bet, after serving notice to all interested parties, including the betting public.

(5) Prescribe through regulations the requirements that shall be met by natural and juridical persons engaged in any horseracing activity; Provided, That in observance of the public safety, order, purity and integrity of the horseracing sport, a program to detect the presence or use of controlled substances shall be implemented, under which reliable tests shall be administered at random to Horseracing Sport and Industry Administration officials and employees as well as any personnel holding a license or permit issued by said Agency to carry out functions directly related to the horseracing activity. The preventive nature of this program is aimed towards addressing, reducing, and deterring the use and abuse of illegal drugs and towards counseling, treating, and rehabilitating the persons concerned. Said program shall be coordinated with the competent entity or entities of the public or private sector that have the reliable resources needed to administer said tests. The funds to defray the cost of said test shall originate from the monies consigned in AIDH for these purposes by virtue of this section and § 198s of this title. The Board shall establish, by regulations, the procedure to be followed so as to render the operation of

the program feasible and efficient. Nothing shall prevent horse owners, handlers, and breeders from holding shares in businesses which operate racetracks in Puerto Rico.
(6) To authorize and regulate the use of electronic, mechanical and photographic apparatus with the purpose of determining the starting and the order that the horses cross the finish line; to photograph and oversee the development of the races, among others.
(7) To declare any natural or juridical person who, in its judgment, attempts, or threatens, or in any way makes evident his purpose of hindering the normal course of the horse racing sport as a horse racing nuisance, by petition of the Horse Racing Administrator, or any natural or juridical person authorized to operate a racetrack in Puerto Rico, or motu proprio. Provided, That in order to make such a determination, the Board shall allow such person the opportunity to testify in his defense at a public hearing, in person or through counsel. Every person who has been declared a horse racing nuisance by the Horse Racing Board, who tries to enter or does enter any racetrack or dependency thereof, shall be guilty of a felony, and upon conviction shall be punished by a penalty of not less than five (5) years nor more than ten (10) years of imprisonment, or by a fine of not less than one thousand (*1,000*) dollars nor more than five thousand (*5,000*) dollars, or both penalties, in the discretion of the court.

Any person who has been declared a horse racing nuisance by the Board cannot request to be reinstated in horse racing activities until a minimum term of five (5) years has elapsed from his designation as a horse racing nuisance. The Board shall, by regulations, provide the conditions and requirements through which the person may be reinstated. If, after being reinstated, the person is

again guilty of undesirable practices for which he shall be declared a horse racing nuisance, the declaration shall extend throughout his lifetime.

(8) To prescribe, by regulations, the fines, administrative penalties and suspensions that can be imposed by the Board, the Horse Racing Administrator, the Stewards or other authorized of ficials.

(9) To issue orders, rules and resolutions and take the necessary measures leading to the physical safety and financial and social security of natural or juridical persons who are connected with the Horse Racing Industry and Sport.

(10) To handle and resolve the petitions for the review of the decisions handed down by the Horse Racing Administrator, the Racing Stewards, or any other official in the exercise of their duties and powers conferred by the Horse Racing Act, the Horse Racing Regulations, or applicable orders or resolutions. Provided, That the Board may for just cause, leave in suspense any punishment, sanction or fine that the Horse Racing Administrator, the Racing Stewards, or any authorized person may impose, not without first giving the parties the opportunity to be heard in a hearing to determine just cause.

(11) To hold hearings, conduct visual inspections, summon witnesses, take oaths and statements, compel the appearance of witnesses, the production of documents and any other additional evidence of any nature deemed to be essential for the complete cognizance of a matter within its jurisdiction. The Board is also empowered to issue orders or summons, and take depositions from persons in any investigations, following the procedure established by law for the Courts of Justice for such purposes, except those parts thereof that are inapplicable. For the purposes of the summons, the Horse Racing Board may avail itself of the services of any judge with the authority

to issue it, and the Police of Puerto Rico. When there is a refusal to comply with this summons, order, or resolution of the Board, it may resort to the Court of First Instance of Puerto Rico, so that said court may order compliance of the order and/or resolution. Any person who refuses to appear as required by the Board, or any of its members when they act in its representation, and does not have just cause for his nonappearance to give testimony or facts on which he shall be interrogated, may be found guilty of a misdemeanor, and upon conviction, shall be punished by a court of competent jurisdiction by a fine of not less than two hundred and fifty dollars ($ 250.00) nor more than five hundred dollars ($ 500.00) for each case, or imprisonment for a fixed term of thirty (30) days, or both penalties in the discretion of the court.

(12) To fix the commission that the racing agents may receive through the authorized betting systems, which in no case shall be less than eleven (11%) percent of the total combinations wagered, except in the case of parimutuel bets where the commission shall be of five (5%) percent from the approval of this act until December 31, 1994; five point five percent (5.5%) from January 1, 1995 to June 30, 1995, and six percent (6%) from July 1, 1995 thereafter. Provided That this percentage shall be figured from the gross amount wagered in parimutuel bets in the racing agencies.

(13) To prescribe by regulations, the compensation that the jockeys that participate in the official races shall receive, based on a uniform payment plan.

(14) To submit to the Secretary of Justice and to the Legislature, with a copy to the Governor, an annual report of its operations, actions and decisions, as well as its recommendations to improve the sport.

(15) To determine and establish by regulations, certain undesirable practices in addition to those listed in § 198q

of this title which are impediments to horse racing activities.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JORGE MAYMO MELENDEZ,
Plaintiff,

vs.

JULIO ALVAREZ RAMIREZ, et al.,
Defendant

CV. 02-2001
San Juan, Puerto Rico

30 September, 2002
9:30 a.m.

INJUNCTION HEARING

DAY 1

BEFORE THE HONORABLE **JOSE A. FUSTE**
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES
COUNSEL FOR THE PLAINTIFF
CHARLES A. CUPRILL, ESQ.

COUNSEL FOR DEFENDANTS
IVETTE M. BERRIOS, ESQ.

Sister Counsel, because he will be cumulative evidence.
THE COURT: Call your next witness.

MR. CUPRILL: The next witness will be Jose Daniel Cruz.

JOSE DANIEL CRUZ, PLAINTIFF'S WITNESS was called as a witness, and after having been duly sworn, was examined and, through the interpreter testified as follows:

DIRECT EXAMINATION

BY MR. CUPRILL:

Q. Will you please state your full name.

A. Jose Daniel Cruz Rodriguez.

Q. Where do you reside?

A. In Carolina.

Q. What is your occupation?

A. I'm a race horse trainer.

Q. Since when?

A. Since 1961.

Q. To this date?

A. Until now.

Q. Mr. Cruz, I am going to ask you, do you recall having visited the office of the Racing Administration on September 14, 1999?

A. Yes.

Q. As a result of what?

A. Of two horse that is tested positive that I have.

Q. Do you recall what they tested positive for?

A. Clembuterol.

Q. Did you meet with Mr. Pacheco at that time?

A. Yes.

Q. Did Mr. Pacheco make to you any offer in reference to those two charges?

A. Well, yes.

Q. What offer did he make to you?

A. He made me an offer that I should take two months and, I believe, also a fine.

Q. Did he make mention to you when he made that offer of Jorge Pucho Maymo?

A. Yes.

Q. What did he tell you?

A. If I remember correctly, he told me that if I didn't take the offer that he was giving me, I could get five years' suspension.

Q. Just as Pucho Maymo?

A. Yes.

Q. And that is what he told you?

A. Yes.

Q. Did you feel intimidated by Mr. Pacheco when he told you that?

A. Well, yes. I became afraid. I said, Five years, gosh.

Q. And as a result of that, you entered into an agreement with the administration?

A. Yes.

Q. And shortly after that incident, did you provide a sworn statement that is dated September 30 for the year 1999?

A. Yes.

Q. And what I am showing you now is in Spanish and English, the sworn statement that is very close to the statement that you provided.

MS. BERRIOS: Your Honor, we have an objection.

THE COURT: Grounds?

MS. BERRIOS: He is declaring what he showed him.

THE COURT: Perhaps the document contains details that have not been elicited and also the evidence of what he stated in writing under oath at that particular time.

MS. BERRIOS: But he can ask him about it.

THE COURT: He can ask him, but we can also use the sworn statement.

BY MR. CUPRILL:

Q. Is that the document that you subscribed?

A. Uh-huh.

Q. And what you have stated here today is what that document contains?

A. Yes.

Q. And was that made when your recollection was fresh, close to the incident with Mr. Pacheco?

A. That's true.

MR. CUPRILL: We offer that document in evidence,and that will be all.

THE COURT: Received. It will be marked as 5. (Plaintiff's Exhibit Number 5 marked for identification)

THE COURT: Cross?

CROSS-EXAMINATION

BY MS. BERRIOS:

Q. Yes. You stated you met with Mr. Pacheco on September 14th.

A. Yes. It must have been on that date because that was the date that we met with him, yes.

Q. When you say "we," who was there?

A. There was another colleague of mine there at that time, but I don't remember his name right now.

Q. Okay. You stated that Mr. Pacheco mentioned to you Mr. Maymo. Could you remember the precise words he told you?

A. No, not exactly.

Q. Can you repeat what he stated to you when he offered you the plea?

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 03-1141

JORGE J. MAYMÓ-MELÉNDEZ

Plaintiff, Appellee

v.

JULIO ÁLVAREZ RAMÍREZ, et al.,

Defendants, Appellants

UNSWORN DECLARATION PURSUANT TO 28 U.S.C. §1746

I, Alexis Fuentes Hernandez, of legal age, married, attorney, and resident of San Juan, Puerto Rico, state:

1. My name and personal circumstances are as aforestated.

2. I am an attorney in the Law Offices of Charles A. Cuprill

3. On April 19, 2004 I reviewed the Petition for Certiorari and the appendix filed in the Supreme Court of Puerto Rico in the case of *Jorge J. Maymó-Melendez* v. *Julio A. Alves Rueda*, CC-02-0678 ("Maymó's Petition").

4. Of Maymó's Petition and its appendix, 1822 pages were in the Spanish language.

5. In addition to the aforementioned pages, subsequent resolutions of the Supreme Court of Puerto Rico, consisting of four (4) pages and Maymo's Motion To Reconsider, consisting of twelve (12) pages, were also in the Spanish language.

6. If a petition for certiorari is filed in the United States Supreme Court, thr toal number of pages that would have to be translated would be 1838.

I declare under penalty of perjury (28 U.S.C. § 1746) that the foregoing is true and correct. Executed on this 23rd day of April, 2004.

[Signature]
Alexis Fuentes Hernandez